(1) Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

VICKI AMMERMAN, Guardian of
PAMELA AMMERMAN, and LANA AMMERMAN,

Respondents.

On Petition For A Writ Of Certiorari
To The Court Of Appeals Of Indiana

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a court, consistent with the Due Process Clause, the Commerce Clause, and federalism principles, may properly consider the financial status of a corporate defendant, including its worldwide "economic wealth," assets, net profits and production costs, in determining whether a punitive damage award is constitutionally excessive under the principles articulated in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

2. Whether, under *BMW's* "comparable penalty" guidepost for deciding the constitutional excessiveness of a punitive damage award, general state statutes establishing criminal penalties for comparable conduct may be disregarded where there are no state civil or criminal statutes specifically addressing the precise conduct at issue.

PARTIES INVOLVED AND RULE 29.6 STATEMENT

All parties below are named in the caption. Ford Motor Company ("Ford") has no parent company, and no other corporation has a financial interest in this matter. The following is a list of domestic and foreign companies in which Ford owns an equity interest of at least 10% but less than 100%: The Hertz Corporation, Consumers Car Club, Collision Team of America, Inc., Ecostar Electric Drive Systems, L.L.C., FRN of San Diego, LLC, FRN of Tulsa, LLC, Invercred Compania Financiera S.A., Ford Motor Company of Australia Limited, Ford Motor Company (Belgium) N.V., Autolatina Comercio e Participacoes Financerias Ltd., Ford Motor Company A/S, Oy Ford Ab, Ford Werke-Aktiengesellschaft, Ford Nederland B.V., Mazda Motors Corporation, Ford Motor Company of Korea, Ford Motor Norge A.S., Pivco Industries AS, Ford Motor Company of New Zealand Limited, Ford Motor Company Private Limited, Ford Motor Company (Switzerland) S.A., Ford Vietnam Limited.

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Petitioner Ford Motor Company respectfully petitions this Court for a writ of certiorari to review a decision of the Court of Appeals of Indiana.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals of Indiana (App., *infra*, 1a-44a), is reported at 705 N.E.2d 539. That court's order denying rehearing, *id.* 47a, is not reported. The order of the Supreme Court of Indiana denying transfer, *id.* 44a-45a, is not reported. The trial court's Entry On Defendant's Motion To Correct Errors And On Defendant's Trial Rule ("T.R.") 60(b) Motion, *id.* 48a-64a, is not reported.

JURISDICTION

The judgment of the Court of Appeals of Indiana was entered on February 12, 1999. That court denied rehearing on April 7, 1999. The Supreme Court of Indiana denied transfer on October 21, 1999. This petition is being timely filed within 90 days of that date. The Court of Appeals of Indiana expressly rejected Ford's federal due process claim. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Due Process Clause of the Fourteenth Amendment provides, in pertinent part, "[N]or shall any State deprive any person of . . . property, without due process of law." U.S. Const. Amend. XIV, § 1.

2. The Commerce Clause provides, in pertinent part: "The Congress shall have the Power . . . To regulate Commerce . . . among the several States." U.S. Const. Art I, § 8, cl. 3.

STATEMENT OF THE CASE

This case demonstrates that, absent this Court's intervention, the promise of *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), will go unfulfilled due to the use by many lower courts of corporate defendants' wealth to justify otherwise excessive, multimillion dollar punitive exactions. In this case, the Indiana Court of Appeals allowed the worldwide financial status of petitioner Ford Motor Company to determine the outcome of its review of the trial court's $13.8 million punitive damage award. The court of appeals, ignoring both this Court's refusal to include the defendant's wealth in the *BMW* analysis and its admonition against extraterritorial punishment, defeated the *BMW* due process "guideposts" for determining constitutional excessiveness by according an overpowering effect to Ford's financial status. While some courts have faithfully applied *BMW* by refusing to use the defendant's wealth to inflate the punishment, many others have taken the same misguided approach as the court below, leading to arbitrary, unpredictable and irrational punishments and frustrating *BMW's* command that States provide advance notice of the maximum penalty that may be imposed for particular conduct. Certiorari should be granted to address the conflicts and confusion among state and federal courts about the relevance of a corporate defendant's wealth and other financial status in the *BMW* framework, and to make clear that this Court's omission of such "wealth" considerations from the *BMW* guideposts was intentional.

Certiorari is also warranted because the Indiana Court of Appeals misapplied *BMW's* "comparable penalty" guidepost in a manner that would render that guidepost meaningless in many cases and that conflicts with the decisions of other courts.

A. Factual Background And Proceedings At Trial

On August 2, 1991, respondents Lana and Pamela Ammerman were riding as passengers in a 1986 Ford Bronco II sports-utility vehicle being driven down a two-lane highway in Rush, County, Indiana at approximately 55-65 miles per hour by Fred Watkins, Jr. *See* App., *infra*, 11a. Mr. Watkins decided to try to pass two vehicles in front of him, a pickup truck and a Chevy Blazer. As Watkins pulled into the opposing lane of traffic, he "kicked" the accelerator down. R. 7850.[1] When he was abreast of the first vehicle (the pickup), the driver of that vehicle began pulling into the opposing lane to pass as well. Watkins swerved his Bronco II to the left, bringing the left wheels off the pavement and onto the road's soft shoulder, all the while continuing to accelerate. R. 7846, 7870. Realizing that he was about to crash into a ditch, Watkins swerved back to the right, bringing his Bronco II back onto the road at a sharp reentry angle. R. 7867-68, 9506. As he regained the road, Watkins saw that he was about to crash into the Blazer and swerved hard to the left, striking the Blazer. R. 9506-07. Finding himself careening toward a guardrail and creek off the left side of the road, and fearing a crash, Watkins jerked the vehicle back to the right again, while still traveling at approximately 60 miles per hour. R. 9507-08. On this, his fourth swerve, the vehicle slid sideways, dug its rims into the road, and rolled over. R. 9508, 9521-11. While Watkins remained in the Bronco II during the accident, receiving minor injuries, respondents were ejected from the vehicle and were severely injured.

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1 Cites to "R." refer to the record on appeal.

Respondents brought a six-count complaint against Ford, alleging product liability, negligence, breach of warranty, and strict liability, and seeking to recover both compensatory damages and punitive damages. The case was presented to the jury solely upon the theory of strict liability in tort, pursuant to Indiana's Product Liability Act. App., *infra*, 12a.

At trial, respondents' theory was that the Bronco II was defective in design because Ford had failed to give the Bronco II a higher "static stability index"—that is, to make it lower and wider, and assertedly less likely to roll over. Respondents supported their theory with the results of a study created by their experts specifically for the trial, using a test methodology that plaintiffs conceded was not used by any other manufacturer or testing organization. App., *infra*, 13a. The test methodology consisted of respondents' experts driving various vehicles with differing stability indices at high rates of speed and turning the steering wheel violently in an effort to force the vehicles to tip over. Respondents' experts did not control for any aspect of this "testing," and thus the results could neither be replicated nor verified. As the court below recognized, "the objective of [the] test was to push each vehicle to its own particular limits in order to verify whether it would roll." App., *infra*, 17a.[2]

As part of its defense, Ford presented evidence that the federal government's automotive safety agency, the National Highway Traffic Safety Administration ("NHTSA"), had specifically rejected the plaintiffs' stability—index design standard for sport-utility vehicles in multiple rulemaking

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2 As the court below also noted, respondents' expert himself conceded that his test "has no protocol for steering inputs," and that any such protocol would be "unrealistic" since the test was intended, if anything, to capture the arbitrary, highly variable and uncontrollable *ad hoc* steering inputs of real drivers who themselves "'don't have any protocol for how much turn they need to put in the steering wheel.'" App., *infra*, 18a (quoting R. at 7074).

pronouncements. It was undisputed, in fact, that NHTSA not only had concluded that stability index was not an effective or reliable indicium of rollover propensity, but also that a stability index design rule "might induce manufacturers to take actions that in some instances could have a net adverse effect on safety." 52 Fed. Reg. 49033, 49034 (1987).

Ford also presented the results of NHTSA's two-year investigation into whether the Bronco II had a defect with respect to safety—namely, an unreasonable propensity to roll over. NHTSA conducted analyses of its own accident databases, and performed its own engineering assessment. NHTSA's conclusion, according to undisputed evidence, was that the Bronco II's stability characteristics did not distinguish the vehicle from the class of sport-utility vehicles of which it was a part, and that the class of sport-utility vehicles was not defective with respect to motor vehicle safety. Accordingly, in October 1990, NHTSA closed its investigation, finding "no reasonable expectation that further investigation would lead to a determination of the existence of a safety-related defect with respect to any of the allegations regarding the propensity of the Bronco II to roll over . . . ." App., *infra*, 109a; R. at 10193.[3]

Despite these findings by the federal agency charged with making national automobile safety policy, respondents urged the jury to calculate the punitive damage award in this case

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[3] NHTSA recently reaffirmed this conclusion, rejecting charges—made by plaintiffs in this case—that Ford's alleged failure to comply fully with agency requests for engineering records somehow affected or tainted the agency's original conclusion in 1990. *See* 64 Fed. Reg. 27343 (1999). Significantly, after completing its updated review, the agency observed that "consistent with its findings [in 1990], [its] analysis of more recent data indicates that the rollover propensity of the Bronco II does not stand out from that of other peer [sport-utility vehicles]." *Id.* at 27353. The Court may properly take judicial notice of the safety agency's conclusions.

based on Ford's sales of the Bronco II *worldwide*. Specifically, respondents' counsel invited the jury to arrive at a punishment by multiplying $83.00, the amount respondents alleged Ford had saved on each vehicle by not complying with respondents' stability index standard, by the total number of Bronco II's Ford actually sold throughout the entire world (700,000). App., *infra*, 34a, 37a.

"The jury complied" (App., *infra*, 38a-39a), awarding $58,000,000 in punitive damages, which it allocated equally to Lana and Pamela Ammerman. App., *infra*, 45a. The jury also awarded Lana and Pamela Ammerman compensatory damages of $400,000 and $4,000,000, respectively.

B. Post-Trial Proceedings Below

1. The Trial Court's Post-Verdict Proceedings

Ford filed Motion to Correct Errors seeking various alternative forms of relief, including the entry of judgment on the evidence for a substantially reduced punitive damage award pursuant to Indiana Trial Rule 59(J)(5) and based on the due process standards set forth in *BMW*. App., *infra*, 47a; R. at 55, 2052. The trial court agreed with Ford that the jury's $58 million punitive damage verdict violated *BMW's* ban on extraterritorial punishment, holding that "by awarding $83 per unit for 700,000 worldwide sales of Bronco IIs as punitive damages, the jury has unwittingly offended the U.S. Constitution." App., *infra*, 63a. But instead of simply recalculating the punishment to reflect only in-state sales of Bronco II's, which would have produced an award of $950,516,[4] the court substituted its own methodology, which also relied on Ford's nationwide activities: the court took the total amount of fixed tooling costs that would have been necessary to convert the entire

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[4] Ford sold 11,452 Bronco II 4x4 vehicles in Indiana. R. 126. Multiplying that figure by the jury's $83 per-vehicle determination would produce a maximum award of punitive damages in this case of $950,516.

Bronco II production line to make vehicles that had the "static stability index" described by the plaintiffs—effectively imposing a $20 per-vehicle penalty for all Bronco II vehicles sold in the nation—and then added $54 to reflect the additional materials it would have cost to make such adjustments to the specific vehicle in which the plaintiffs were riding. App., *infra*, 34a, 63a.

Based on that calculation, the court remitted the punitive damages award to $13,800,054. The court rejected Ford's excessiveness arguments under *BMW*, relying heavily on its finding that "Ford's net worth is about $219 Billion [sic] and its gross income in 1994 was, roughly, $50 Million per hour. The punitive damages awarded represented only 1% of Ford's 1994 profits. This Court cannot say that within the context of Ford's enormous wealth, its profit of $2.2 Billion from the sale of Bronco II, and the damages sustained that 'at first blush' or otherwise, these damages are excessive." App., *infra*, 61a-62a; Op. 18-19.

The trial court upheld the jury's verdict in all other respects, and entered judgment in the amount of $7,300,026 to Lana Ammerman and $10,900,027 to Pamela Ammerman. App., *infra*, 41a; R. at 5135.

2. The Court of Appeals' Decision

Ford appealed to the Court of Appeals of Indiana, arguing, *inter alia*, that the remaining punitive damage award violated the *BMW* constitutional principles because it was predicated on Ford's aggregate worldwide wealth and out-of-state activities, exceeded the grand total of *all* punitive damage awards affirmed in Indiana history at the time of the verdict, and was grossly excessive under each of the *BMW* guideposts. App., *infra*, 35a. On February 12, 1999, the Court of Appeals issued its opinion affirming the trial court's judgment.

In rejecting Ford's argument that "nothing in Indiana's judicial history could have provided it with fair notice that such a huge award of punitive damages would be assessed" (App., *infra*, 42a), the court of appeals emphasized that "the economic wealth of the defendant should be considered." *Id.*

The court noted that in light of pre-*BMW* cases, which had involved much smaller awards of compensatory and punitive damages, "Ford knew or should have known that an award of punitive damages could have resulted in a ratio as high as 100 to 1," and then explained that this "is especially true given that Ford's economic wealth ($219 billion in total assets, $21.7 billion in net worth, and $5.3 billion in net profits) is a factor to be considered in assessing punitive damages." *Id.* at 44a.

The court of appeals also dismissed the comparable penalties guidepost of *BMW* as "not applicable." App., *infra*, 42a. While the court acknowledged that Indiana imposed a maximum criminal fine of $10,000 for criminal recklessness, the court found this fine irrelevant because neither that statute nor any other Indiana law established specific penalties for "the manufacture and sale of a defective product." *Id.*. The court also found, "[i]n any event," that the pre-*BMW* ratios and Ford's wealth gave it fair notice that it could be subjected to this "huge punishment." *Id.*

Ford timely filed a petition for rehearing, which the court of appeals denied on April 7, 1999. App., *infra*, 47a.

3. The Indiana Supreme Court's Denial of Transfer

Ford timely filed a petition to transfer the case to the Supreme Court of Indiana, raising its federal constitutional challenges to the $13.8 million punishment. The Supreme Court of Indiana denied Ford's petition to transfer on October 21, 1999. App., *infra*, 45a-46a.

REASONS FOR GRANTING THE WRIT

Since this Court's decision in *BMW*, the problem of arbitrary, capricious and grossly excessive punitive damages awards has not abated. Massive punitive damages judgments continue to be inflicted across the country in a broad spectrum of cases, especially in cases like this one involving large out-of-state corporate defendants that do business throughout the Nation. Indeed, just in the last year there has been an outbreak of record—setting awards against the country's three biggest automobile manufacturers. *See, e.g., Anderson v. General Motors Corp.*, No. BC116926 (Cal.

Super. Ct., Los Angeles County Aug. 26, 1999) ($4.8 billion punitive damage jury verdict in automobile design defect case subsequently reduced to $1.09 billion); *Jimenez v. Chrysler Corp.*, ___ F. Supp. 2d ___, 1999 WL 1101339 (D.S.C. Dec. 2, 1999) (upholding $250 million in punitive damages in automobile design defect case); *Romo v. Ford Motor Company*, No. 82318 (Cal. Super Ct., Stanislaus County) (July 12, 1999) ($290 million punitive damage verdict in automobile design defect case subsequently overturned on grounds of jury misconduct).

Many lower courts have continued to uphold such excessive awards on grounds that are entirely inconsistent with this Court's *BMW* decision. As this case demonstrates, for example, lower courts routinely evade the objective factors set forth in *BMW*, such as comparable statutory penalties and the ratio between compensatory and punitive damages, and instead rely on a factor rejected in *BMW*—the defendant's worldwide wealth, profits, and costs—as a basis for upholding huge punishments, thereby punishing the corporate defendant for its lawful conduct in other jurisdictions and nullifying any possibility of meaningful judicial review under the three *BMW* guideposts.

This Court's review is necessary to resolve the conflicts and confusion that have arisen since *BMW* on these issues, and to ensure that the *BMW* guideposts continue to have meaningful effect.

A. The Court Should Grant Certiorari To Make Clear That A Defendant's Aggregate Wealth And Financial Activities Are Irrelevant To The Analysis Under *BMW*

1. This Court In *BMW* Rejected Use Of The Defendant's Wealth As A Guidepost

In *BMW*, this Court held that when a punitive damage award is "grossly excessive" in relationship to a State's "legitimate interests" in punishment and deterrence it "enter[s] the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." 517 U.S. at 568. The Court explained that a State has no legitimate

interest in punishing conduct that took place outside the State's borders, that was "lawful where it occurred" and that "had no impact" on the State seeking to impose the punishment. *Id.* at 572. Under the federal due process inquiry into excessiveness, therefore, a punitive damage award must be analyzed without regard to such out-of-state conduct, "with consideration given only to the interests of [the citizens of the State seeking to impose the punishment], rather than those of the entire Nation." *Id.* at 574.

As part of its excessiveness analysis, the Court further announced that "elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." 517 U.S. at 574. To determine whether a particular defendant had fair notice of the magnitude of the punitive—and thereby to determine if the award is "grossly excessive"—this Court articulated "three guideposts": (1) the "degree of reprehensibility of the defendant's conduct" (*id.* at 575); (2) the ratio between the punitive damage award and "actual harm inflicted on the plaintiff" (*id.* at 580); and (3) the relationship between the punitive damage award and "the civil or criminal penalties that could be imposed for comparable conduct" (*id.* at 583).

The respondent-plaintiff in *BMW* argued that the aggregate wealth of the petitioner-defendant should be part of the constitutional calculus and warranted upholding the $2 million award in that case under the Due Process Clause. *See* Br. of Respondent at 39, *BMW of North America v. Gore*, No. 94-896 ("The award is also constitutionally justified by reference to BMW's wealth. The evidence showed that even 'the $4 million judgment would not have a substantial impact' on BMW's financial position."). But this Court rejected that argument, declining to adopt the defendant's wealth as a due process guidepost and declaring: "The fact that [a defendant] is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business. Indeed, [a corporation's] status as an active participant in the national economy

implicates the federal interest in preventing individual States from imposing undue burdens on the interstate commerce." 517 U.S. at 585.

Justice Breyer, in his concurring opinion, added that, although Alabama permitted the courts to look to the "'financial position' of the defendant" in deciding whether an award was excessive under state law, "[t]his factor is not necessarily intended to act as a significant constraint on punitive awards. Rather, it provides an open-ended basis for inflating awards when the defendant is wealthy." *Id.* at 591 (Breyer, J., concurring).

2. The Lower Courts Are In Conflict Regarding Whether The Defendant's Wealth May Be Considered Under *BMW*

Notwithstanding the *BMW* Court's rejection of wealth as a guidepost under the Due Process Clause, lower courts since *BMW* have frequently affirmed large punitive damages awards as constitutional based on the overall wealth of large corporate defendants. The trial court below, for example, relied heavily on Ford's worldwide wealth and profits: "The punitive damages awarded represented only 1% of Ford's 1994 profits. This Court cannot say that within the context of Ford's enormous wealth, its profit of $2.2 Billion from the sale of Bronco II, and the damages sustained that 'at first blush' or otherwise, these damages are excessive." App., *infra*, 62a. The court of appeals likewise held that Ford should have been on notice that it could be hit with this massive fine, and that the punishment was not unconstitutionally excessive, "given that Ford's economic wealth . . . is a factor to be considered in assessing punitive damages." App., *Infra*, 44a. The court even held that Ford's wealth made it "especially" true that Ford had notice that a large ratio between compensatory and punitive damages would be tolerated. *Id.*

Other courts have taken a similar approach, invoking the defendant's wealth to trump the due process analysis mandated by *BMW*. The Eighth Circuit, for example, upheld a $400,000 punitive damages award under *BMW* in part because "[t]he award of $400,000 is less than one one-

thousandth of Southern Union's approximately $500,000,000 net worth." *Morse v. Southern Union Co.*, 174 F.3d 917, 925-26 (8th Cir.), *cert. denied*, 120 S. Ct. 29 (1999). In *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1338-39 (11th Cir.), *cert. denied*, 120 S. Ct. 329 (1999), the Eleventh Circuit upheld a $4.35 million punitive damage award under *BMW*, in part because "[defendant] is a large and extremely wealthy international corporation."

Just last month a federal district court upheld a $250 million punitive damage award under *BMW* against an auto manufacturer in light of evidence that the defendant "had a net worth exceeding $11.5 billion . . . , earned more than $13 billion in profits in the past three years . . . , earned profits of approximately $13 billion just on minivan sales from 1987 through 1995 . . . , and has $6.9 billion in cash on hand." *Jimenez*, 1999 WL 1101339 at *29-34. The court concluded that under *BMW* the comparable civil penalties were to be scaled up by a factor of 50,000 to reflect "an average year's profits on minivan sales of approximately $1,500,000,000."

In August 1999, a state trial court in California upheld $1.09 *billion* in punitive damages (reducing the jury's $4.8 billion verdict) against an auto manufacturer under *BMW*, explicitly based on the defendant's wealth. The court held: "[T]he fair notice requirement has been satisfied under the particular facts of this case .... [D]efendant possessed information of its financial condition, putting it on notice that it might face an award as large as the one in this action." L. 1 at 2-3 (*Anderson v. General Motors Corp.*, No. BC116926, slip op. at 2-3 (Cal. Super. Ct., Los Angeles County) (Aug. 26, 1999)).[5]

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5 Twelve copies of all documents with "L." cites have been lodged with the Office of the Clerk of the Court.

Additional examples of this utter frustration of *BMW* through reliance on the defendant's wealth are legion in the federal courts.[6]

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6 *See, e.g., Greenbaum v. Svenska Handelsbanken*, N.Y., 67 F. Supp. 2d 228, 272 (S.D.N.Y. 1999) (purporting to apply BMW in upholding $1.25 million punitive damages award in light of defendant's stipulated ability to pay the award, observing that "[t]his stipulation qualifies [defendant] for the very highest punitive damages awardable for conduct of its flagrancy"); *Scribner v. Waffle House, Inc.*, 14 F. Supp. 2d 873, 940-46 (N.D. Tex. 1988) (imposing $7.45 million punitive damages award following bench trial, treating "the size of Waffle House" as a separate factor under BMW and observing that Waffle House "had total revenues of $283 million from its company-operated restaurants in the last fiscal year before trial, and the total revenue of its additional 465 'franchise restaurants' was $187 million during the same period. Also, the net income of Waffle House for the last fiscal year before trial was approximately $12 million."), *vacated upon stipulation of parties*, 62 F. Supp. 2d 1186 (N.D. Tex. 1999); *Alejandre v. Republic of Cuba*, 966 F. Supp. 1239, 1253 & n.14 (S.D. Fla. 1997) (imposing $137.7 million punitive damages award following bench trial and citing *BMW* as guidance regarding due process limits, but relying on wealth to establish award: "The record reflects that each MiG [military aircraft] is worth approximately $45 million, and that the Cuban Air Force owns approximately 102 MiGs. The total value of this fleet, which is undoubtedly only a fraction of the Cuban Air Force's total assets, is therefore approximately $4.59 billion. The Court finds that 1% of this total, or $45.9 million, should be assessed against the Cuban Air Force for each of the killings."); *T.B. Proprietary Corp. v. Sposato Builders, Inc.*, 41 U.S.P.Q. 2d 1120 (E.D. Pa. 1996) (upholding $675,000 punitive damages award under *BMW*, noting that "a corporate defendant's net worth may be considered in determining the excessiveness of the amount of punitive

[Footnote continued on next page]

State courts have been engaging in the same misuse of wealth as a proxy for a proper analysis of constitutional excessiveness under *BMW*. In *Dillard Department Stores, Inc. v. Beckwith*, 989 P.2d 882 (Nev. 1999), for instance, the Nevada Supreme Court recently upheld a punitive damage award of $1.87 million, rejecting the defendant's argument that premising the punishment on its "nationwide worth," violated *BMW*'s limits on extraterritorial punishments. L. 2 (excerpts from appellant's briefs in *Dillard*). In response, the Nevada Supreme Court failed even to mention *BMW*, and instead noted the "subjective nature of punitive damages and the absence of workable standards by which to evaluate the propriety of such an award." 989 P.2d at 887. The court expressly approved of the trial court's reliance on the defendant's "nationwide worth," and simply declared: "The award will not financially destroy or annihilate Dillard. Therefore, the punitive damage award is affirmed." *Id.* at 888.

Similarly, in *Lakin v. Senco Products, Inc.*, 987 P.2d 463 (Or. 1999), the Oregon Supreme Court upheld a $4 million punitive damage judgment based in part on the wealth of the defendant. Although the court purported to analyze the excessiveness issue under *BMW*, the analysis addressed only the factors enumerated in the state statute authorizing punitive damages, which included "the financial condition of

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[Footnote continued from previous page]
damages awarded" and that "Toll's gross revenues in 1994 were over $500 million"), *aff'd*, 135 F.3d 766 (3d Cir. 1997); *Wood v. Allstate Insurance Co.*, 1997 WL 602796 (E.D. Pa. Sept. 19, 1997) (upholding $150,000 punitive award with only cursory discussion of BMW because "[t]he Third Circuit has endorsed a ratio of around one percent of a defendant's net worth for a punitive damage award," and the award was "well within the acceptable range" when compared to defendant's worldwide net worth of $13.2 billion) (citing *Dunn v. HOVIC*, 1 F.3d 1371, 1383 (3d Cir. 1993)).

the defendant." Relying on the reasoning of the Oregon Court of Appeals, which observed that "the defendant had a net liquidation value of $82,076,000" and that the award "equals approximately five percent of defendant's net value," the court held that the award was not "unconstitutionally excessive." *Id.* at 475-76 (citing *Lakin v. Senco Prods., Inc.*, 144 Or. App. 52, 76-77 (1996)). *See also, e.g., Sierra Club Found. v. Graham*, 85 Cal. Rptr. 2d 726, 743 (Cal. Ct. App.) (upholding $2.02 million punitive damage award "[u]nder either *BMW* or" state law where the defendant's net worth was $90 million, noting that "the award was more than 2 percent of Graham's net worth, far less than the 10 percent cap generally recognized by our courts" and opining that "[t]he *BMW* guidelines are just that—guidelines which, if not exactly replicated in a state scheme, do not spell constitutional doom"), *review denied* (Cal. Sept. 29, 1999); *Axen v. American Home Prods. Corp.*, 974 P.2d 224, 241-43 (Or. Ct. App.) (upholding $20 million punitive damage award purportedly under *BMW*, observing that "[t]here is evidence that AHP's annual profits are such that a smaller award may simply be absorbed as a cost of doing business"), *review denied*, 329 Or. 357, *petition for cert. filed*, No. 99-789, 68 U.S.L.W. 3327 (U.S. Nov. 4, 1999).

This approach plainly contradicts *BMW* and conflicts with the approach taken by the other courts that have addressed the wealth issue since *BMW*. These cases generally recognize that a defendant's wealth cannot justify upholding a punitive damage award that is deemed "grossly excessive" when analyzed pursuant to the *BMW* principles and guideposts. In fact, whereas the trial court here upheld the punishment in part because it was "only 1% of Ford's 1994 profits," the Tenth Circuit has squarely rejected such an approach. *See, e.g., Continental Trend Resources, Inc. v. OXY USA*, 101 F.3d 634, 641 (10th Cir. 1996) ("From the [*BMW*] Court's statements we conclude that a large punitive award against a large corporate defendant may not be upheld on the basis that it is only one percent of its net worth or a week's corporate profits.").

Numerous other courts have likewise rejected the notion that wealth can sustain a punishment otherwise deemed excessive under *BMW*. *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 659 n.16 (8th Cir. 1995) (retired Justice White, sitting by designation) ("a defendant's wealth cannot alone justify a large punitive damages award"); *Pivot Point Int'l, Inc. v. Charlene Prods., Inc.*, 932 F. Supp. 220, 223 (N.D. Ill. 1996) (Easterbrook, J., sitting by designation) (holding evidence of a defendant's wealth inadmissible under federal law to establish the proper amount of punitive damages in part because, "even when considering punitive damages based on state law, the Supreme Court did not treat the defendant's wealth as relevant" in *BMW*); *Florez v. Delbovo*, 939 F. Supp. 1341, 1348 (N.D. Ill. 1996) ("[I]t is clear that [defendant's] wealth cannot save a punishment that is deemed to be excessive under the *BMW* approach"); *Utah Foam Prods. Co. v. Upjohn Co.*, 930 F. Supp. 513, 531 (D. Utah 1996) ("Manifestly, wealth alone does not justify imposition of a disproportionately large punitive damage award"); *Parrott v. Carr Chevrolet, Inc.*, 965 P.2d 440, 454 (Or. Ct. App. 1998) ("[A]lthough the wealth of a defendant is a relevant inquiry on the issue of punitive damages, it is not a necessary element, and whether a defendant is financially able to pay an award does not mandate that it should do so") (citations omitted); *VF Corp. v. Wrexham Aviation Corp.*, 686 A.2d 647, 649 (Md. Ct. Special App. 1996) ("[A] defendant's wealth cannot be the principal basis for a punitive damage award"), *rev'd on other grounds*, 715 A.2d 188 (Md. 1998).

This disagreement concerning the use of wealth under *BMW* is intolerable and, in and of itself, frustrates *BMW's* basic principle that citizens are entitled to advance notice of the size of potential monetary punishments.

3. The Wealth Issue Is Important, Substantial, And Recurring

This Court should grant certiorari in this case to make clear that the defendant's wealth is utterly irrelevant to the *BMW* inquiry. This issue is important and substantial, recurs

frequently, and plainly warrants the Court's review in this case.

There are strong arguments that a defendant's financial status should play no role, at any stage of the proceedings, in deciding the severity of punishment in our system of government. This Court has repeatedly cautioned that introduction of evidence of a defendant's wealth may be unfair and unduly prejudicial to large, nonresident corporate defendants, and may raise special due process problems. *See TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 464 (1993); ("[an] emphasis on the wealth of the wrongdoer increase[s] the risk that the award may [be] influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident"); *Honda Motor Co. v.* Oberg, 512 U.S. 415, 432 (1994); ("the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences").

In addition, "[b]asing a decision on income and assets calls into question the courts' commitment to do equal justice to the rich and poor." *Pivot Point Int'l, Inc. v. Charlene Prods., Inc.*, 932 F. Supp. 220, 223 (N.D. Ill. 1996) (Easterbrook, J., sitting by designation). Punitive damages, of course, "share key characteristics of criminal sanctions" (*Landgraf v. USI Film Prods., Inc.*, 511 U.S. 244, 281 (1994)), and it is difficult to imagine this Court endorsing the imposition of a harsher criminal sanction against a citizen based on his or her financial status. As the Court stated in *Furman v. Georgia*, 408 U.S. 238, 256 (1972) (per curiam) "A law that stated that anyone making more than $50,000 would be exempt from the death penalty would plainly fall, as would a law that in terms said that . . . those who made less than $3,000 a year, or those who were unpopular or unstable should be the only people executed." *See, e.g., Robinson v. California*, 370 U.S. 660 (1962) (punishment of "status" held unconstitutional); *see also Powell v. Texas*, 392 U.S. 514 (1968) (punishment can only be inflicted on the basis of the defendant's wrongful acts or behavior, not on the

basis of status); *id* at 543 ("Punishment for a status is particularly obnoxious . . . .") (Black, J., concurring).

Using wealth as a factor in punishing a corporation also is irrational. The wealth of corporations, unlike that of individuals, is not even arguably relevant to punitive damages because "[c]orporate assets finance ongoing operations and are unrelated to either the injury done to the victim or the size of the award needed to cause corporate managers to obey the law." *Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992); II American Law Institute, *Reporters' Study: Enterprise Responsibility for Personal Injury* 253-255 (1991) (measuring the appropriateness of a punitive award based on a corporation's net worth "cannot be justified even by the rationale of economic deterrence, let alone retributive punishment"); *cf. BMW*, 517 U.S. at 591 (Breyer, J., concurring); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268-69 (1981) ("it is far from clear that municipal officials, including those at the policymaking level, would be deterred from wrongdoing by the knowledge that large punitive damage awards could be assessed based on the wealth of their municipality . . . the impact on the individual tortfeasor of this deterrence in the air is at best uncertain").

The defendant's wealth simply has no place in the *BMW* analysis. As Justice Breyer observed in his *BMW* concurrence, the wealth factor is an "open-ended basis for inflating awards when the defendant is wealthy." 517 U.S. at 591. Indeed, where, as here, a reviewing court infuses its *BMW* review with consideration of a large corporate defendant's worldwide wealth, the wealth factor obliterates the actual *BMW* guideposts and principles.

Thus, for example, the court below held that, because Ford has significant "economic wealth" it "knew or should have known that an award of punitive damages could have resulted in a ratio as high as 100 to 1." App., *infra*, 43a. But the court's injection of the defendant's wealth into the "reasonable relationship" guidepost of *BMW* makes no sense whatsoever. In fact, the court below was so distracted by Ford's wealth that it neglected entirely the proper analysis

required by the reasonable relationship guidepost. The court compared the 18 to 1 and 1.8 to 1 ratios between the large punitive and compensatory damage awards in this case to the ratios in a small number of pre-*BMW* cases in which both the compensatory and punitive damages awards were relatively modest, and then quickly moved on to Ford's wealth (App., *infra*, 39a), without any recognition of this Court's admonition that compensatory damages themselves have significant deterrent effects. *See Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (stating that "[d]eterrence ... operates through the mechanism of damages that are compensatory" (emphasis omitted)). *See also Smith v. Wade*, 461 U.S. 30, 94 (1983) (O'Connor, J, dissenting) ("awards of compensatory damages and attorney's fees already provide significant deterrence"); *Rosado v. Santiago*, 562 F.2d 114, 121 (1st Cir. 1977); *Koufakis v. Carvel*, 425 F.2d 892, 907 (2d Cir. 1970). Whatever ratio may be permissible when compensatory and punitive damages are relatively low has virtually no relevance to a case such as this, where the compensatory award alone was nearly as high as the largest punitive award ever affirmed in the history of the State. *See* R. 85-86, 106-24. In such circumstances, there is simply no legitimate interest of the State left to be served by a large punitive award, yet the court below found a high ratio to be "especially" appropriate given Ford's wealth.

The Indiana Court of Appeals' reliance on Ford's wealth had an equally illogical and distorting impact on its consideration of *BMW's* comparable penalty factor. Although Ford demonstrated that the $13.8 million punitive damage award affirmed in this case was 1,380 times the size of the maximum criminal penalty for comparable misconduct and that the punishment, standing alone, exceeded the *total* amount of all punitive damages affirmed on appeal in *all* cases in Indiana history, the Indiana court relied on Ford's wealth to reject Ford's argument that "nothing in Indiana's judicial history could have provided it with notice that such a huge award of punitive damages would be assessed." *Id.* In other words, because Ford has significant wealth, the sky is the limit on punitive damages, irrespective of *BMW*.

See also Jimenez., 1999 WL 1101339 at *29-34 (in applying *BMW, actual* statutory penalties must be artificially inflated to account for defendant's wealth).

Reliance on the worldwide "economic wealth" of a corporation, which the courts below broadly defined to include "total assets," "net worth," and "net profits," *id.*, as well as the nationwide retooling costs saved by Ford by not adopting the design changes advocated by plaintiff (App., *infra*, 34a, 38a, 43a-44a), also flouts *BMW's* ban on extraterritorial punishment, interfering with the policy choices of other States and the federal government and imposing undue burdens on interstate commerce in violation of both the Due Process Clause and the Commerce Clause. 517 U.S. at 571-72. Ford's "economic wealth" is the product of lawful conduct in other States that had absolutely no impact on Indiana consumers. Under *BMW*, Indiana is prohibited from punishing such conduct and the Indiana courts were precluded from considering this conduct—and the economic products of it—in deciding whether the punishment was so grossly excessive that it violated the Due Process Clause. As this Court declared as far back as 1881: "No State can legislate except with reference to its own jurisdiction. . . . Each State is independent of all the others in this particular." *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881).

Indeed, Indiana has no more right under the Constitution to calculate punitive damage awards based on Ford's profits from sales in other jurisdictions than it does to impose a sales tax on such out-of-state-sales. *See Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273 (1978). "The principle that a State may not tax value earned outside its borders rests on the fundamental requirement of both the Due Process and Commerce Clauses that there be 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.'" *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 777 (1992) (invalidating New Jersey's taxation of gain on out-of-state sale of asset) (quoting *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-45 (1954)). *See also Norfolk & W. Ry. Co. v. Missouri State Tax Comm'n*, 390 U.S. 317, 325 (1968)

(invalidating application of Missouri tax apportionment statute to railroad's rolling stock); *Hans Rees' Sons, Inc. v. North Carolina*, 283 U.S. 123, 133-35 (1931) (invalidating application of North Carolina tax apportionment statute to New York manufacturer of leather goods).

In short, courts around the country are relying on the wealth of the defendant as a factor to defeat *BMW*'s limits on unconstitutional punishments. Given the important and recurring nature of the problem, and the conflicting, confusing rulings by the lower courts on this issue, the Court should grant certiorari in this case.

B. The Court Should Also Grant Certiorari To Clarify The "Comparable Penalty" Element Of The *BMW* Analysis

Review also is warranted because lower courts are in conflict over application of *BMW*'s "comparable penalty" guidepost. While the Court in *BMW* admonished that "a reviewing court . . . should accord 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue," *BMW*, 517 U.S. at 583, some courts are already treating this factor as a dead letter.

Here, the court of appeals not only improperly tainted its analysis under this factor with its consideration of Ford's financial status (*see* App., *infra*, 42a), but the court also found this "indicia of excessiveness not applicable," simply because the Indiana statutes did not include a penalty specifically targeting defective design of a product. Thus, the court cast aside as irrelevant the fact that the punishment was 1,380 times the maximum $10,000 statutory criminal fine for comparable—indeed, far more egregious—conduct. The Court also ignored entirely the gross excessiveness of the award when compared to prior awards affirmed by the courts of Indiana.

The decision below is symptomatic of a trend in some jurisdictions to evade this *BMW* guidepost. In fact, many courts have outright disregarded the comparable penalty factor. *See, e.g., Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154 (Wis. 1997) (upholding $100,000 award of

punitive damages in trespass case, even though plaintiff awarded only $1 in nominal damages and statutory penalty for trespass was capped at $1,000); *Green Tree Acceptance of Texas, Inc. v. McGrath*, 1998 WL 337755 (Tex. App. June 24, 1998) (upholding $60,000 punitive damage award in malicious trespass case, even though plaintiff awarded only $4,250 in compensatory damages and statutory penalty for trespass was $2,000); *Johansen v. Combustion Eng'g., Inc.*, 170 F.3d 1320 (11th Cir. 1999) (upholding remitted punitive damage award of $4.35 million even though actual statutory penalty imposed on defendant was only $10,000). Other courts have reasoned that, where the comparable penalty is very low, it is irrelevant (*BMW v. Gore*, 701 So. 2d 507, 514 (Ala. 1997); *Wal-Mart Stores, Inc. v. Robbins*, 719 So.2d 245 (Ala. Civ. App. 1998); *Jimenez*, 1999 WL 1101339 at *34), which, of course, turns *BMW's* due process and fair notice analysis on its head. 517 U.S. at 583-84 (finding punitive damage award grossly excessive in part because award greatly exceeded very low statutory penalty).

Lower courts have reached directly conflicting decisions over application of this guidepost. Several courts, like the Indiana Court of Appeals, have held that comparable penalty guidepost is "not applicable" because there is no civil or criminal statutory penalty governing the specific conduct at issue, even though there are generally applicable fines that encompass that conduct. App., *infra*, 42a; *see also Continental Trend*, 101 F.3d at 641 ("Oxy's misconduct involved a violation of common law tort duties that do not lend themselves to a comparison with statutory penalties"); *Inter Medical Supplies, Ltd. v. EBI Medical Systems, Inc.*, 181 F.3d 446, 468 (3d Cir. 1999) ("We agree with the Tenth Circuit's observation that 'a violation of common law tort duties [may] not lend [itself] to a comparison with statutory penalties.'"). Indeed, some courts have even pointed to the absence of a specific fines as a *justification* for awarding large punitive damages awards. *See, e.g., Broome v. Biondi*, 17 F. Supp. 2d 211, 229 (S.D.N.Y. 1997) (finding that $410,000 punitive award was "reasonable when compared with the penalties that could be imposed for the conduct at issue" because "[u]nder the Federal Fair Housing Act . . .

there is no limitation on the amount of punitive damages that may be awarded for such conduct").

But several courts have taken the opposite approach. For example, in *Schimizzi v. Illinois Farmers Ins. Co.*, 928 F. Supp. 760, 786 (N.D. Ind. 1996), the court reduced a $600,000 punitive award without addressing whether Indiana had enacted a specific statutory penalty governing the conduct at issue because, even assuming defendant's conduct was "felonious," "every felony under Indiana law is punishable by a maximum fine of $10,000" and therefore the punitive award was "substantially greater than any criminal fine." *See also Lee v. Edwards*, 101 F.3d 805, 811-12 (2d Cir. 1996) (relying on general criminal fine for "making of a false statement" in deciding that $200,000 punitive damage award for malicious prosecution was excessive under *BMW*); *Ace v. Aetna*, 139 F.3d 1241, 1248-49 & n. 23 (9th Cir. 1998) (finding $16.5 million punitive damage award against insurance company for "bad faith" denial of a claim excessive because the award "far exceeds" Alaska's general criminal penalty for "scheming to defraud"); *Bowden v. Caldor, Inc.*, 710 A.2d 267, 286 (Md. 1998) (reducing $9,000,000 punitive award in case involving false accusation of stealing claim because it was "nine times higher than the greatest criminal fine authorized by the Maryland Legislature," even though no specific statute or regulation punished the conduct at issue); *Florez*, 939 F. Supp. at 1348-49 (reducing punitive award in discrimination case in light of analogous federal law cap on civil damages that did not expressly cover conduct in question); *cf. Groom v. Safeway, Inc.*, 973 F. Supp. 987 (W.D. Wash. 1997) (expressing caution based on lack of alternative legislative sanctions and concluding that a 10-to-1 ratio between punitive and compensatory damages was "certainly the limit" under such circumstances).

Moreover, in applying the "comparable fines" element of the *BMW* analysis, some courts have held that it is relevant that the punitive damage award vastly exceeds any prior punitive damage award affirmed in the jurisdiction. *See, e.g., Patterson v. PHP Healthcare Corp.*, 90 F.3d 927, 943 (5th Cir. 1996), *cert. denied*, 519 U.S. 1091 (1997) (vacating

a punitive damages award of $150,000 in a federal race discrimination case as excessive, where largest prior punitive award in comparable cases in the circuit had been $50,000); *Kimzey v. Wal-Mart stores, Inc.*, 107 F.3d 568, 577-78 (8th Cir. 1997) (remitted punitive award of $5,000,000 in employment discrimination case reduced to $350,000 because even as remitted, award greatly exceeded prior awards in "similar cases"); *Lee*, 101 F.3d at 812 (remitting $200,000 punitive damage award to $75,000 based in part on comparison to prior awards in jurisdiction); *Geuss v. Pfizer, Inc.*, 971 F. Supp. 169 (E.D. Pa. 1996) (remitting $150,000 punitive award to $17,500 because defendant's conduct was less blameworthy than conduct in other cases imposing large punitive awards). But, in direct contrast, the court below ignored the fact that the $13.8 million punishment here exceeded by many times the *combined total* of all prior punitive damages awards affirmed in the entire history of the state of Indiana and was nearly 100 times the largest award ($150,000) that had ever been affirmed at the time the alleged misconduct occurred. *F.W. Woolworth Co. v. Anderson*, 471 N.E.2d 1249, 1254 (Ind. Ct. App. 1984).

As this Court recently reiterated in the analogous context of establishing a constitutional excessiveness standard under the Excessive Fines Clause of the Eighth Amendment, "judgments about the appropriate punishment for an offense belong in the first instance to the legislature," making the relationship between a judicially imposed penalty and a legislative fine for comparable conduct "particularly relevant" in deciding whether the punishment is so grossly disproportionate that it violates the Constitution. *United States v. Bajakajian*, 524 U.S. 321, 330-31 (1998). Yet many courts have rendered the comparable penalty factor of *BMW* particularly irrelevant, by ignoring it, misinterpreting it, or subverting it. Review by this Court is warranted to ensure meaningful application of this vital safeguard against excessive punishments and to clear up the confusion existing in the lower courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

January 19, 2000

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APPENDIX

FORD MOTOR COMPANY,
Appellant-Defendant,

v.

VICKI AMMERMAN, Guardian of PAMELA AMMERMAN and LANA AMMERMAN,
Appellees-Plaintiffs.

No. 49A05-9608-CV-322

Court of Appeals of Indiana

APPEAL ROM THE MARION SUPERIOR COURT, ROOM #5
The Honorable David L. Rimstidt, Judge
Cause No. 49D05-9331-CT-1305

Feb. 12, 1999.

Rehearing Denied April 7, 1999.

OPINION – FOR PUBLICATION

RUCKER, Judge.

Case Summary

Lana and Pamela Ammerman (referred to collectively as "the Ammermans") sustained severe and permanent injuries when a 1986 Bronco II 4x4 in which they were passengers rolled over. The vehicle was manufactured by Ford Motor Company. The Ammermans sued Ford on various theories of liability, and they also sought punitive damages. The case proceeded to trial by jury upon the theory of strict liability in tort pursuant to Indiana's Product Liability Act. The jury returned a verdict in the Ammermans' favor. Lana

Ammerman was awarded compensatory damages in the amount of $400,000.00 and Pamela Ammerman was awarded compensatory damages in the amount of $4 million. The jury also awarded each of the Ammermans $29 million in punitive damages for a total punitive damages award of $58 million. On motion by Ford the trial court reduced the total punitive damages award to $13.8 million. Ford also filed a motion for relief from judgment which the trial court denied. Ford now appeals and the Ammermans cross appeal.

Issues on Direct Appeal

1. Did the trial court err in admitting as scientific evidence the emergency avoidance testing conducted by the Ammermans' expert.

2. Did the trial court err by excluding Ford's evidence that passenger cars roll over on paved surfaces from side force alone in light of the Ammermans' theories that (i) passenger cars are immune from rollover and, (ii) Bronco IIs should have been designed to perform the same as passenger cars.

3. Was the evidence sufficient to sustain an award of punitive damages.

4. Was the punitive damages award, even as remitted, violative of (i) the due process clause of the U.S. Constitution, and (ii) Indiana common law and the proportional penalties clause of the Indiana constitution.

5. Did the trial court err in denying Ford's motion for relief from judgment when actions of the Ammermans' experts immediately after trial contradicted their trial testimony and their representations to the trial court.

Issue on Cross Appeal

Did the trial court err in remitting the award of punitive damages.

Background

As a result of the gasoline shortages of the late-1970s, the automotive industry attempted to make its fleet more fuel efficient. R. at 5643. Pursuant to governmental regulations and consumer demands, Ford decided to introduce a new compact pickup truck and sports utility vehicle (SUV), the Ranger and the Bronco II, respectively. R. at 5645. Ford elected to make the Bronco II a derivative vehicle of the Ranger because only a moderate investment would be required, making the Bronco II more profitable than other alternatives presented.[1] R. at 7194-95. As a derivative vehicle the Bronco II shared the same assembly line with the Ranger and was practically identical from the "B" pillar forward. R. at 7193.

Using an entirely new platform, as opposed to modifying that used for the Ranger, would have delayed production one to two years, placing Ford at least a year-and-a-half behind the release of General Motors' ("GM") competitive SUV, the Chevrolet S-10 Blazer. R. at 8880. The first Bronco II, known as "Job 1," was to be manufactured in mid-January 1983 and to be released in mid-March 1983. R. at 6041. GM was scheduled to release the Blazer in the early fall of 1982. Id. Ford projected sales of the Bronco II to reach 468,000 with a net profit realized on each vehicle of $3,570 and total net profits of $1.6 billion dollars. R. at 7194-95.

Ford selected the Jeep CJ-7 as its image vehicle which meant that the CJ-7 was Ford's developmental point of reference. R. at 7696, 8711. The goals for the Bronco IIs came from the CJ-7's performance, package dimensions, and characteristics. R. at 8711-12. At the time Ford selected the CJ-7 as its image vehicle, Ford knew that studies showed that the Jeep CJ-5 and CJ-7 had rollover propensities

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[1] Approximately three hundred million dollars was saved by making the Bronco II a derivative of the Ranger. R. at 8880.

significantly higher than other vehicles in their class. R. at 7698.[2] The popular television program "60 Minutes" aired a segment which described the danger of Jeep rollovers in late 1980 of which Ford was aware, yet it continued to use the CJ-7 as its developmental model.[3] R. at 5995, 7188. According to some experts in the field, the tendency to roll over is caused by a low static stability index ("SI"). The SI describes the relationship between a vehicle's track width and the height of the vehicle's center of gravity. The lower the SI, the higher the risk of rolling over. A vehicle with a narrow track and a high center of gravity is more likely to roll.

In February 1981, Ford engineers offered management five proposals to make the Bronco II more stable. Proposals One and Two involved slight increases in the Bronco II's stability index to 2.02 and 2.03, respectively. R. at 6001- 02. Proposals Three, Four and Five involved additional widening of the track and lowering of the center of gravity. These changes would result in SIs of 2.09, 2.19, and 2.25, respectively.[4] R. at 6001-04. Proposals One and Two could be completed by the production deadline date for the Bronco II; but Proposals Three, Four, and Five "[could] not be contained within Job # 1, 1983 P/U 4x4 timing" because they involved increasing ride height, widening the track, and/or making body revisions. R. at 6001. As a result Ford chose to proceed with Proposal Two knowing that the Bronco II

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[2] The Highway Safety Research Institute released a report in February 1980 which concluded that Jeep CJ vehicles had a more than triple rollover fatality rate relative to that of standard sized utility vehicles. R. at 7703.

[3] Ford had just approved the Bronco II program on October 22, 1980. R. at 7188.

[4] Adopting Proposal Five would have resulted in $13.8 million dollars in retooling costs and $54 per vehicle in piece cost. R. at 6001.

would have a stability index of 2.03, worse than that of the CJ-7 at 2.04. R. at 6003.

In addition to an automobile's stability index, its tendency to roll over is governed by the amount of understeer or oversteer[5] and its sensitivity to steering inputs. R. at 5990. Ford added a front stabilizer bar to the Bronco in order to increase the Bronco II's roll stiffness, hoping to increase the amount of its understeer. R. at 7467. When equipped with a front stabilizer bar the Bronco II was an understeer vehicle, but when it approached its cornering limit, the Bronco II became an oversteer vehicle. R. at 6658-61. After adding a front stabilizer bar, Ford performed only subjective tests to evaluate the bar, without performing objective tests such as limit maneuvers or lane change testing. R. at 6676-81.

Another factor affecting the Bronco II's stability was Ford's use of the twin I-beam (swing-axle) suspension. Swing axles have a tendency to "jack" because lateral forces on the tire tend to push the axle up. Jacking has two effects: (1) the tires will move inward under the vehicle, causing the vehicle to become narrower, and (2) the front of the vehicle moves up, making the vehicle taller. R. at 6231-34. As a result, stability decreases instantaneously. Jacking causes the Bronco II to jump up or "spike," when the vehicle experiences lateral forces of about .65 Gs. R. at 6267. Ford knew about the jacking problem associated with the twin I-beam suspension. The engineering department published a paper as early as 1965 warning that in smaller vehicles twin I-beams created jacking during cornering. R. at 6251. Ford did have safer choices, and its own engineers recommended

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[5] A vehicle that has "oversteer" can produce extremely high lateral accelerations with small steering inputs. R. at 5990. An "understeer" vehicle, on the other hand, can have larger gross steering inputs, yet will not achieve a lateral G force level above roll stability characteristics. *Id.*

the use of a MacPherson strut which lowers the center of gravity. However, the executive in charge of making the suspension decision elected to go with the twin I-beam as a result of pressures from his superiors. R. at 7970-72. Ford also sought additional marketing advantages available with the twin I-beam.[6]

After the decision to go with Proposal Two had been made, Ford built a mechanical prototype of the Bronco II using the Jeep CJ-7 as its image vehicle and making the Proposal Two modifications. Ford then scheduled extensive testing of the mechanical prototype. R. at 7209. As a result of the testing, Ford engineers reported that the Bronco II's track needed to be widened or its ride height lowered. R. at 7212.

After the mechanical prototype testing, Ford built engineering prototypes. Initially, the prototypes were tested with the vehicle performing J-turns[7] of up to 55 m.p.h. and 360 degrees of steer. R. at 7215. The vehicle would tip over at speeds as low as 30 m.p.h. Id. Ford's engineers tried a combination of different suspensions, tires, and steering designs in an attempt to stabilize the Bronco II. Id. By mid-March 1982, development engineers again reported that to improve the problem of rollovers, the track width had to be increased by three to four inches. R. at 7222.

In April 1982, Ford scheduled a meeting to review a track-widening proposal and to "develop a contingency plan which will not delay Job # 1." R. at 7230. The engineers

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[6] A narrow track-width was required in order to sell the Bronco II in Japan which was a market that Ford wanted to fill. R. at 8861.

[7] The "J-turn" is a test "commonly used to evaluate the rollover performance of motor vehicles." R. at 7009. The test is performed by keeping the steering wheel in a straight position then turning it and holding it in that turn. R. at 7013-14.

concluded that a 2-inch increase in track width was the minimum required for a minor improvement in stability. R. at 7239. A significant improvement in J-turn handling could be achieved on a Bronco II by using 14-inch wheels or increasing track-width 3 to 4 inches. R. at 7241. Neither of these recommendations was ever implemented.[8] R. at 7276. Even modest increases of two inches were rejected by Ford because "even with 110% effort, Job # 1 would be in serious jeopardy." R. at 7268, 7286. Eight months from the commencement of Job # 1, the engineers once again recommended increasing the track by two inches which would have delayed Job # 1 by three months. R. at 7284-85. These recommendations were necessitated by the results of a test conducted on track during May 1982 at the Arizona Proving Grounds. The test drivers experienced the prototypes tipping up onto two wheels, outriggers failing, and vehicles pole-vaulting over. R. at 8809-10. In fact live J-turn testing was halted because it was too dangerous for the engineers and test drivers. R. at 8809-11. Ford did not resume live J-turn testing until May 1989, six years after production of the Bronco II had commenced. R. at 7339. Ford implemented several superficial changes in order to increase the Bronco II's stability, including adding weight below the center of gravity, adding sealant to the tires, and changing the wheels. R. at 6045-48, 6965. Ford did not make any major changes because they required widening the track or removing the twin I-beam. R. at 6074-77. Both of which were costly and would have delayed production.

On May 28, 1982, at or around the time of the Arizona Proving Grounds testing, Ford collected all documents relating to Bronco II's handling characteristics. This was the first time in Ford history that it had gathered engineering documents relating to any particular vehicle prior to production. All documents were maintained in a single

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[8] There was discussion about implementing changes in later years, but this was never done. R. at 7286.

location--Ford's Office of General Counsel. These documents were reviewed by Ford employees with the intent to "clos[e] the loop of vehicle documentation in this case." R. at 6964. One hundred thirteen documents were specifically related to the Bronco II program reports, test requests, test plans, and simulation analysis. Fifty-three of the documents disappeared. One of those documents, an "assessment update" issued two months before the production deadline, contained a separate document identified as "attachment two." The attachment listed seven major risks due to incomplete testing of the Bronco II. R. at 7337. The attachment was never found nor made available to the Ammermans. On November 24, 1982, Ford approved the Bronco II, certifying it was ready for production. The Bronco IIs placed on the market did not have the recommended increased track-width of at least 2 inches or a lower center of gravity. R. at 8879-80.

After the advent of production Ford engineers continued to raise questions concerning Bronco II's stability. In September 1986 Ford considered but disregarded larger tires because they would decrease the SI and "raise questions with . . . OGC [Office of General Counsel]." R. at 6136. Another Ford engineer recommended consideration of more permanent methods of improving the Bronco's stability, including lowering the vehicle's center of gravity, adding more weight, and widening the track width. The engineers were essentially ignored. By placing the Bronco II on the market, Ford failed to meet its own design criteria. Ford's design goals for the Bronco II were the following:

1. Extremely safe;

2. Reduce rollover propensity to minimum including panic situations;

3. Avoid (virtually preclude) over correction in accident avoidance maneuvers;

4. Remain stable at all speeds under maximum steering inputs per human factors analysis;

5. Respond safely to large steering inputs which are typical of accident avoidance or emergency maneuvers; and

6. Handling and stability equal or better than any vehicle in class.

R. at 5960. The vast majority of vehicles will not roll over or tip-up during J-turns and emergency avoidance maneuvers. R. at 7069-70.

Although the National Highway Transportation Safety Administration ("NHTSA")[9] has never promulgated rollover resistance standards, it has investigated defects which contribute to a propensity for rollover. The NHTSA conducted a defect investigation of the Bronco II from late 1988 until October 1990. At trial, the parties stipulated that "Ford did not provide any information to the NHTSA concerning the January to May 1982 APG [Arizona Proving Grounds] testing of Bronco II prototypes. The issues of whether the NHTSA asked for such information and whether Ford should have provided it to them [were] for . . . the jury to settle." R. at 8486.

In September 1988 NHTSA requested information from Ford concerning the Bronco II. Ford acknowledges that it was supposed to provide information that answered questions posed by NHTSA but indicated it "didn't notice that [NHTSA] delineated development testing." R. at 8492-93. The NHTSA requested that Ford:

> [f]urnish the number and copies of all owner reports, . . . investigations, memoranda, and other records from all sources either received or

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[9] The NHTSA is an administration in the Department of Transportation. 49 U.S.C.A. § 105. Its jurisdiction includes "prescib[ing] motor vehicle safety standards for motor vehicles and motor vehicle equipment in interstate commerce; and [ ] carry[ing] out needed safety research and development." 49 U.S.C.A. § 30101.

> authorized by Ford, or which Ford is otherwise aware, pertaining to (a) rollover, stability or similar performance or (b) the subject alleged defects of the Bronco II . . . (c) any information Ford may have comparing the Bronco II's stability factor (center of gravity height) with other motor vehicles.
>
> Identify the parties involved and describe any and all tests and analyses at (1) Ford, . . . or subject alleged defects, or (b) used to establish the stability of the Bronco II. . . . Furnish copies of all reports, notes, tables, graphs, film, photographs, or similar documentation which were developed for each.
>
> Furnish a copy of all documents not specifically requested which Ford believes are pertinent to the alleged defects and the resolution of the alleged defects, or were used in formulating its assessment of the alleged defects.

R. at 10146, 10149, 10150. Ford asserted that it believed the Spring 1982 APG testing did not have to be submitted to the NHTSA. Robert Munson, Ford's representative responsible for responding to the NHTSA and Jeffrey Miller, then NHTSA chief counsel and current lobbyist for the automobile industry, confirmed that Ford sent the NHTSA production testing but did not submit the APG live limits testing. The NHTSA neither conducted tests of its own nor questioned Ford about the documents produced. After considering Ford's response alone, the NHTSA issued a closing report on October 31, 1990, stating there "appears no reasonable expectation that further investigation would lead to a determination of the existence of a safety-related defect with respect to any of the allegations regarding the propensity of the Bronco II to rollover." R. at 10197-98.

After the Bronco II was put on the market, Ernest Grush, Ford's automotive safety office statistician, acknowledged

that he met with representatives of Consumer Union[10] ("CU") in April 1989 to discuss Bronco II accident data. CU was contemplating publishing a report about the Bronco II's instability. A day after this meeting, Jerry Sloan, another Ford representative, authored a memorandum reporting on the meeting, stating that Ford visited with CU to "moderat[e] what might otherwise be a totally disastrous story." R. at 9264. Sloan's memorandum reported that Ford had "clouded their [Consumer Union's] minds, loosened some conclusions, . . . and sent them off to search for additional information which may work to our advantage." R. at 9264.

Facts and Procedural History

On August 2, 1991, Pamela and Lana Ammerman were riding as passengers in a 1986 Ford Bronco II 4x4 which was owned and driven by Fred Watkins, Jr. There were two vehicles ahead of Watkins, a pickup truck and a Chevy Blazer. As Watkins approached the two vehicles, he began to pass them. When Watkins was abreast of the truck, it pulled into the left lane forcing Watkins onto the left shoulder. Watkins then steered to the right to bring his Bronco back onto the road. However, he once again swerved left after he collided with the Blazer. Immediately thereafter, Watkins swerved right to avoid hitting a guardrail. Upon this maneuver, the Bronco slid sideways and rolled over. Both Pamela and Lana were ejected from the vehicle, and both sustained serious and permanent injuries. Pamela underwent exploratory surgery for a blood clot on the back of her abdominal wall. She was diagnosed with a crushed pelvis and closed head injuries, including a skull fracture, contusions, and swelling of her brain. As a result of her closed head injuries, Pamela suffered cognitive deficits, speech problems, weakness on the left side of her body, and

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[10] Consumer Union is a non-profit organization whose self-described mission is to "test products, inform the public, and protect consumers."

swallowing problems requiring a feeding tube. Pamela was not discharged from the hospital until twelve weeks after the accident and underwent physical therapy for eighteen months. Pamela's brain damage is permanent, and she currently has the mental capacity of a twelve-or thirteen-year-old girl. Another side effect of the brain injuries has been the onset of a bipolar disorder (manic depression), and she has attempted suicide as a result of her condition. Pamela needs both medical and psychiatric care in order to stabilize her mood. Her medical expenses exceeded $200,000.00 and she lost an estimated $723,717.00 to $971,757.00 in earning capacity. Lana suffered a femoral fracture of the left thigh bone, right clavicle fracture of the collar bone, and a collapsed lung. Because she lost a large part of her temporal muscle leaving a "caved in" appearance, Lana was forced to undergo multiple reconstructive surgeries which have not completely cured her facial injuries. She continues to walk with an unsteady gait although a rod was inserted to stabilize her femur. Lana's medical expenses totaled over $80,000.00.

The Ammermans filed a six-count complaint against Ford asserting various theories of liability including products liability, negligence, breach of warranty, and strict liability in tort. The case ultimately was presented to the jury upon the theory of strict liability in tort pursuant to Indiana's Product Liability Act. After a twelve-day trial resulting in a record exceeding 10,000 pages, the jury returned a verdict in the Ammermans' favor. Lana was awarded compensatory damages in the amount of $400,000.00, and Pamela was awarded compensatory damages in the amount of $4 million. The jury also awarded each of the Ammermans $29 million in punitive damages for a total punitive damages award of $58 million.

Thereafter Ford filed a timely motion for relief from judgment pursuant to Ind. Trial Rule 60(B)(8) contending that certain tests performed by the Ammermans' experts shortly after the trial contradicted their trial testimony. The

trial court denied the motion. Also Ford filed a motion to correct errors seeking various alternative forms of relief. One of which was the entry of judgment on the evidence for a substantially reduced punitive damages award pursuant to T.R. 59(J)(5). The trial court granted the motion and remitted the punitive damages award to slightly more than $13.8 million. This appeal followed.

Discussion and Decision

Admissibility of Scientific Evidence

At trial one of the theories the Ammermans advanced was that Ford ignored its engineers' recommendation to give the Bronco a higher SI. The Ammermans argued that "[h]ad Ford taken appropriate steps to increase the index to 2.25," the accident would not have occurred. Brief of Appellee at 25. The Ammermans introduced expert testimony by Dr. Michael Kaplan, an engineer with a Ph.D. in solid mechanics. Dr. Kaplan testified that a vehicle's SI determines whether it is stable and whether it would tend to roll over. According to Dr. Kaplan, the Bronco's SI made it unstable. Dr. Kaplan also asserted that vehicles with higher stability indices would not roll over, and automobile manufacturers could make vehicles immune to rollover by increasing the indices. In support of his theory, Dr. Kaplan and his partner, Robert Hooker, presented their own emergency avoidance maneuver ("EAM") test. This test involved Hooker driving utility vehicles around pylons using simulated emergency maneuvers. Dr. Kaplan testified that the protocol for the test was the following:

a) to drive a vehicle (with outriggers) in a 12-foot lane at a pre-determined speed (usually 35-50 MPH in 5 mile increments) as close to an obstacle (traffic pylons) which block a lane of traffic before imputing steer to the left (in a left avoidance maneuver) to avoid the pylons; and

b) as the vehicle clears the barrier (pylons), input steering back to the right to correct the first steer; and

c) then input a third steer to straighten the vehicle back into the original lane of travel; and

d) make all inputs as quickly as possible; but

e) picking off cones with outriggers is not a negation of a test, nor does picking off the cone with the vehicle itself necessarily negate the test. The protocol is to 'avoid and correct.'

R. at 5960-62. Ford challenged the test as unscientific and inadmissible under Ind. Evidence Rule 702(b). The trial court admitted the test and all expert testimony based thereon. Ford contends the trial court erred in so doing.

An expert's opinion must be based on more than subjective belief or unsupported speculation. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590, 113 S.Ct. 2786, 2795, 125 L.Ed.2d 469 (1993), *cert. denied*, 516 U.S. 869, 116 S.Ct. 189, 133 L.Ed.2d 126 (1995). Evid. R. 702(b) provides: "Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable." Thus, the proponent of the expert testimony must establish that the requirements of Evid. R. 702(b) have been met. *McGrew v. State*, 682 N.E.2d 1289, 1290 (Ind.1997). When this is done, the burden shifts to the opponent of the evidence who then must attack the basis for receipt of the evidence, usually through the use of preliminary questions. *Weinberg v. Geary*, 686 N.E.2d 1298, 1301 (Ind.Ct.App.1997), *reh'g denied*. The trial court assumes the function of "gatekeeper" in ensuring that an expert's testimony rests on a reliable foundation and is relevant to the issue at hand. *Hottinger v. Trugreen Corp.*, 665 N.E.2d 593, 596 (Ind.Ct.App.1996). Determining whether expert testimony is reliable, and thus admissible, is a matter within the trial court's discretion. *Daubert*, 113 S.Ct. at 2795. The issue for the trial court is

whether a sufficient basis for reliability has been established so that the expert testimony will be likely, in fact, to "assist the trier of fact to understand the evidence or [correctly] determine a fact in issue." Evid. R. 702(a); *Weinberg*, 686 N.E.2d at 1301. We will reverse the court's determination only "if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable and actual deductions to be drawn therefrom." *Burkett v. State*, 691 N.E.2d 1241, 1245 (Ind.Ct.App.1998). Of course, whenever expert testimony is admitted its opponent is free to challenge both the credibility of the expert and the weight to be given his testimony by the jury.

Ford relies heavily on criteria established in *Daubert* in arguing that the Ammermans failed to meet their burden regarding liability. Although *Daubert* is not binding upon the determination of state evidentiary law issues, it is helpful to us as "[t]he concerns driving Daubert coincide with the express requirement of Indiana Rule of Evidence 702(b) that the trial court be satisfied of the reliability of the scientific principles involved." *Steward v. State*, 652 N.E.2d 490, 498 (Ind.1995).

In determining whether scientific evidence is reliable, the trial court must determine whether it appears sufficiently valid or, in other words, trustworthy to assist the jury. *Daubert*, 113 S.Ct. at 2795 n. 9. In so doing, the trial court "must make a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue." *Hottinger*, 665 N.E.2d at 596. While not presuming to set out a definitive checklist or test regarding factors which bear on the reliability inquiry, the *Daubert* court outlined key considerations: (1) whether the theory or technique at issue can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error; (4) the existence and

maintenance of standards controlling the technique's operation; (5) and whether the technique is generally accepted within the relevant scientific community. *Id.* at 2796-97. Although these considerations are useful, "there is no specific 'test' or set of 'prongs' which must be considered in order to satisfy Indiana Evidence Rule 702(b)." *McGrew*, 682 N.E.2d at 1292. Rather, reliability may be established by judicial notice or by sufficient foundation to convince the trial court that the relevant scientific principles are reliable. *Id.* at 1290; *Steward*, 652 N.E.2d at 499. When laying a sufficient foundation, the focus must be on the principles and methodology behind the science rather than the conclusions generated. *Daubert*, 113 S.Ct. at 2797; *Hottinger*, 665 N.E.2d at 596-97.

We have reviewed the evidence and arguments, and we find no abuse of discretion in the court's decision to admit the testimony of Dr. Kaplan. We proceed by addressing the various points raised by Ford.

Ford challenges the admissibility of Dr. Kaplan's test results contending: (1) it lacked established protocols including instrumentation; (2) it was neither generally accepted nor reviewed by the relevant scientific community; and (3) Dr. Kaplan and Hooker designed and conducted the test exclusively for litigation purposes. According to Ford, Dr. Kaplan's test was unreliable because it was performed without preset protocols[11] or instrumentation.[12] Specifically, Ford argues the lack of requirements renders the test unreliable because the test can neither be duplicated nor verified. Ford further argues one cannot determine the test's error rate due to a lack of standards controlling the test's operation. The Ammermans counter that preset protocols

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[11] Protocols include defined steering inputs, speed, distances traveled, and the path followed.

[12] Instrumentation includes recording the vehicles' speed as well as measuring yaw rate and lateral acceleration.

and instrumentations are unnecessary. They argue that failure to establish protocols or instrumentations does not render EAM tests unreliable, and that it is not uncommon to conduct EAM tests without instrumentation or specific protocols. The Ammermans further contend that the objective of Dr. Kaplan's test was to push each vehicle to its own particular limits in order to verify whether it would roll. Given the variations in each vehicle, defined protocols would not necessarily push a vehicle to its limits.

Because "[s]cientific methodology today is based on generating hypotheses and testing them to see if they can be falsified," a key consideration is whether a technique can be and has been tested. *Daubert*, 113 S.Ct. at 2796. Another consideration is the technique's known or potential rate of error. *Id.* at 2797. Thus, the existence and maintenance of standards controlling the test's operation is relevant to the trial court's inquiry. *Id.* at 2797. This is in keeping with the focus on principles and methodology. *See Hottinger*, 665 N.E.2d at 596-97. Accordingly, a sufficient foundation may be laid when the expert testimony provides reasonably specific details regarding the testing process utilized and the basis for the resulting opinion. *Davis v. State*, 598 N.E.2d 1041, 1049 (Ind.1992), *reh'g denied.* However, the more technical the technique or test involved, the less particularized are the foundational requirements. *Hopkins v. State*, 579 N.E.2d 1297, 1303 (Ind.1991). "It thus would appear that the greater the level of expertise involved, the more that procedural particulars are left to the expert's discretion." *Id.*

Ford does not appear to object to EAM tests in general. In fact, they do not question the methodology or theory behind EAM tests. Instead, Ford challenges Dr. Kaplan's opinion due to the procedures utilized during his EAM tests. Dr. Kaplan affirmed that his test has no protocol for steering inputs. He asserted that such a protocol is unrealistic because

> [p]eople faced with a situation in the real world where they're driving down the road and there's an obstacle in front of them don't have any protocol for how much turn they need to put in the steering wheel. What they're concerned with is avoiding the obstacle . . . and so our test protocol doesn't involve putting in a specific amount of steer. What the protocol involves is making a sharp turn to avoid the obstacle.

R. at 7074. Contrary to Ford's assertion, Dr. Kaplan testified that there does exist a protocol regarding the particular path traveled during the test. Dr. Kaplan further testified that he and Hooker performed the tests at the same speeds. Dr. Kaplan affirmed that the only instrumentation utilized is an internal camera which records the amount the steering wheel is turned. According to Dr. Kaplan, instrumentation is irrelevant when determining a vehicle's tendency to roll over; it is more appropriate when determining a vehicle's handling properties. Dr. Kaplan testified that "you don't need instruments to tell you [whether a vehicle will tip up or not]. What you have to do is just look at the test results and see whether or not the vehicle tips up in these turns." R. at 7081-82. Both sides questioned Dr. Kaplan extensively on the matters of protocol and instrumentation. In response, Dr. Kaplan provided details regarding the testing process utilized and the basis for his opinion.

Ford presented testimony critical of Dr. Kaplan's test. Ford's expert, Lee Carr, rendered his opinion of Dr. Kaplan's test:

> Q: I gather it's the conclusions that Mr. Hooker draws and not his methodology with which you disagree? Is that accurate?
>
> A: Yes.
>
> Q: Do you have any criticisms of the methodology utilized by Mr. Hooker?

A: Yes, in the context that I don't really have any instrumentation or data to work with to truly evaluate what he's doing.

R. at 4118-19. We are therefore left with two contradictory opinions concerning whether Dr. Kaplan's testing procedures were sufficient.

Conflicting opinions between experts as to the validity of testing procedures do not necessarily render the opinion of one expert inadmissible. *Orr v. State*, 472 N.E.2d 627, 633 (Ind.Ct.App.1984) and cases cited therein.[13] Instead, unless the conflict is such as to persuade the court that the testimony of the one expert is so much in error, or so lacking in scientific basis that it will not, in fact, assist the jury to correctly determine a fact in issue, the conflict should go simply to the weight of the evidence. *See Davidson v. State*, 580 N.E.2d 238, 243 (Ind.1991).

We find that the conflict at issue here, test protocols and instrumentation, or lack thereof, did not require the exclusion of Dr. Kaplan's testimony and, accordingly, the court did not abuse its discretion in allowing the evidence. Such conflicts did certainly go to the weight of the evidence and, as such, were properly put before the jury.

After listening to the examination on foundation, the court stated that it found Dr. Kaplan's tests were capable of producing reliable results, the tests were themselves capable of being tested, they were documented sufficiently to allow peer review, and other entities had used similar testing. The court did express concern about the Daubert element dealing with the known or potential rate of error but stated that much of the preliminary questioning had touched on that factor and it was the court's view that under the circumstances the potential for error should be left to the jury in determining the weight to be given the evidence. We can find no abuse

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[13] While *Orr* was decided prior to adoption of the Rules of Evidence, the point of law remains valid.

of discretion in that determination. It is clear from the record that the court understood its role as gatekeeper and fully considered the evidence bearing upon admissibility in reaching its determination. As the Daubert court observed, "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." 113 S.Ct. at 2798.

Ford also maintains the evidence to which Dr. Kaplan testified was not generally accepted by the scientific community, and therefore, was unreliable. According to Ford, no other entity uses a test similar to the Kaplan/Hooker test to assess vehicle stability. The Ammermans counter that EAM tests similar to the one at issue are widely used by a variety of entities, including automobile manufacturers.

General acceptance within the relevant scientific community does have a bearing on the inquiry into whether a test is reliable. *Daubert*, 113 S.Ct. at 2797. Acceptance, however, is not a rigid requirement although the trial court may consider widespread acceptance when ruling evidence admissible. *McGrew*, 682 N.E.2d at 1291 n. 4. In addition, whether a known technique attracts only minimal support is also relevant to the admissibility inquiry. *Id.* It is important to note that this approach is more liberal than the traditional "general acceptance" standard established by *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923). Instead of wholesale exclusion under an uncompromising "general acceptance" test, appropriate means of attacking shaky evidence include vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof. *Daubert*, 113 S.Ct. at 2798.

Both sides subjected Dr. Kaplan to vigorous examination. Dr. Kaplan testified that the EAM, alternatively known as obstacle avoidance maneuver, consists of a "rapid turn into the adjoining lane and a continuous rapid turn back into the original lane." R. at

7014-15. The purpose behind such a maneuver is to test a vehicle's performance when a driver attempts to avoid an obstacle in his or her path by making rapid, consecutive turns. On direct examination, the Ammermans introduced a list compiled by Dr. Kaplan which identified a number of entities that use emergency avoidance maneuvers to evaluate vehicles for rollover. The entities listed included automobile manufacturers such as Ford, American Motors, and Toyota. It also included private consultation companies as well as Consumer Union. During voir dire examination, Dr. Kaplan testified that although all EAM tests are performed for the same purpose, their protocols may differ with respect to speeds, distances, and whether pylons are used. In fact, Dr. Kaplan stated that no other entity follows the exact protocol as that used by his company.

Following extensive direct examination and preliminary questioning, the trial court found the Ammermans' expert testimony met the *Daubert* standard. The trial court observed that "[t]he techniques must also in *Daubert* be generally accepted within the scientific community that we're dealing with, and I think that there's been an adequate foundation laid by the exhibits which showed that other entities have used the test and similar tests to the one in question." R. at 7154. We agree with the trial court. Although the Ammermans introduced evidence that other entities use the EAM, Ford failed to produce evidence that EAM tests are totally unacceptable. It is true that Dr. Kaplan's test differs from others used. However, it also appears that the majority of the EAM tests in use differ somewhat from one another. We cannot say that these variations render Dr. Kaplan's test inadmissible. Rather, any variations go to the weight of the evidence and are a matter for the jury to resolve.

Ford also contends that the Ammermans' failure to establish that Dr. Kaplan's test was neither reviewed by his peers nor published brings its reliability into question. Whether a theory or technique has been subjected to peer

review and publication is a pertinent consideration. *Daubert*, 113 S.Ct. at 2797; *Hottinger*, 665 N.E.2d at 596. However, publication is not a sine qua non of admissibility. *Daubert*, 113 S.Ct. at 2797. Although publication may be considered a component of "good science" in that it increases the likelihood that substantive flaws in the given methodology will be detected, neither publication nor lack thereof is dispositive when considering the scientific validity of a particular technique or methodology on which an expert opinion is premised. *See Hottinger*, 665 N.E.2d at 596; *cf. Daubert*, 113 S.Ct. at 2797 (noting that well-grounded but innovative theories may not be published while some propositions are too particular, too new, or of too limited interest to be published).

The Ammermans do not refute Ford's claim that Dr. Kaplan's test has not been published in a peer-reviewed journal. However, this fact alone should not render his expert testimony inadmissible. Rather, the reliability of a test should be brought into question through vigorous cross-examination and the presentation of contrary evidence. *See Daubert*, 113 S.Ct. at 2798. In this case, Ford had ample opportunity to attack Dr. Kaplan's test with considerable preliminary questions. Following Ford's preliminary examination, the trial court stated in pertinent part:

> The Daubert test also says that your theories must be subject to peer review, and I think that also goes to the repeatability aspect of the arguments that have been made here. I don't think that peer review is required; but, obviously, these tests are documented well enough that they are subject to review of peers.

R. at 7153-54. We agree with the trial court. Although not subjected to peer review in the formal sense, the adversary nature of the trial subjected Dr. Kaplan's test to thorough scrutiny and increased the likelihood of detecting substantive flaws in his methodology. Ford had ample opportunity to

contradict and disprove Dr. Kaplan's testimony through cross-examination and presentation of its own evidence.

Ford further contends the admission of Dr. Kaplan's expert testimony was in error given the fact that Dr. Kaplan and Hooker developed their test exclusively for litigation purposes. "[W]hether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying" is a factor considered relevant by some courts. *See Smelser v. Norfolk S. Ry. Co.*, 105 F.3d 299, 303 (6th Cir.1997), *cert. denied*, -- U.S. --, 118 S.Ct. 67, 139 L.Ed.2d 29 (1997) (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1317 (9th Cir.1995), *cert. denied*, 516 U.S. 869, 116 S.Ct. 189, 133 L.Ed.2d 126 (1995)). These courts believe the fact that an opinion arises from tests developed independent of litigation "important, objective proof that the research comports with the dictates of good science." *Smelser*, 105 F.3d at 303. Although the authority of other jurisdictions is worthy of consideration, we find no Indiana case which requires or even suggests that a test's origins has a bearing on whether it is admissible. Not even *Daubert* itself advocates such a rule. Again, any questions regarding whether research comports with the dictates of good science should be addressed through cross-examination and presentation of evidence.

Exclusion of Ford's Evidence

Ford contends the Ammermans' case was premised on the twin assertions that passenger cars are immune from rollovers and that Ford violated its own design goals by failing to give the Bronco II the same rollover stability as it set out in a 1973 letter to the National Highway Traffic Safety Administration. In an effort to explain or contradict these contentions, Ford sought to introduce "hard evidence" in the form of studies of passenger car rollovers, federal statistics, and foundational research. The trial court

excluded the evidence, however, based upon a determination that it was irrelevant. In response, Ford made an offer of proof. Ford now complains that the exclusion of evidence left the jury with a misleading impression with respect to whether it is feasible to design a passenger car which is immune to on-road, tire-induced rollovers and whether enforcement of passenger car design standards against the Bronco II would result in a rollover proof vehicle. Thus, Ford concludes that the exclusion of this evidence prejudiced its defense.

Evidence is relevant if it has a tendency to prove a material fact. *Booker, Inc. v. Morrill*, 639 N.E.2d 358, 363 (Ind.Ct.App.1994). The question of relevance is for the discretion of the trial judge and will be reversed only where a clear abuse of discretion is shown. *Id.* Moreover, a trial court is afforded considerable latitude in the admission or exclusion of evidence. *Indiana Ins. v. Plummer Power Mower*, 590 N.E.2d 1085, 1088 (Ind.Ct.App.1992). Reversal based upon the erroneous exclusion of evidence is justified only where the evidence relates to a material matter or substantially affects the rights of the parties. *Faulkner v. Markkay of Indiana, Inc.*, 663 N.E.2d 798, 800 (Ind.Ct.App.1996).

Even assuming the evidence Ford sought to introduce was relevant, the record reveals that Ford was permitted to introduce evidence contradicting and explaining the Ammermans' assertions. We find support for this conclusion in the testimony of two of Ford's expert witnesses, Carr and Donelson. At trial Carr explained how engineers set and test performance goals in the design of different types of vehicles and the factors impacting a vehicle's rollover stability. R. at 11067-69. He then went on to explicitly state that all vehicle makes and models have been involved in rollovers, R. at 10954, and that it is not possible to design a vehicle that is immune to rollovers. R. at 11112. Donelson testified

concerning the statistical relationship between T/2H[14] as a single characteristic and the rollover rates of numerous vehicles as an outcome of accidents. During his testimony, Donelson presented charts indicating that passenger cars and utility vehicles alike are subject to rollovers. R. at 10707, 10725-27. He also testified that it is misleading to look at rollover rates for a single class of vehicles without comparison to rollover rates of other classes of vehicles. According to Donelson, numerous factors contribute to vehicle rollovers, some of which are not related to the vehicle design. R. at 10765. In light of the testimony offered by Carr and Donelson, we conclude that Ford was afforded an opportunity to contradict and explain the Ammermans' assertions and, therefore, the exclusion of additional evidence did not leave the jury with a false or misleading impression. Also, having examined Ford's offer of proof, we conclude the excluded evidence was merely cumulative of the testimony already provided.

Sufficiency of Evidence Supporting Punitive Damages

Ford contends the evidence at trial was not sufficient to support any award of punitive damages. Ford's argument is based on three grounds: (1) for the automobile industry as a whole the NHTSA rejected stability index as a predictor of rollover propensity, (2) NHTSA specifically investigated allegations that the Bronco II had an inordinate propensity to roll over and concluded that further investigation was not likely to yield any evidence that the Bronco II was defective from a rollover safety standpoint, and (3) there was no clear and convincing evidence that Ford possessed an "evil state of mind" in the production of the Bronco II or that there was a "high degree of danger" that the Bronco II would roll over. Brief of Appellant at 50.

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[14] T/2H is the formula for determining a vehicle's stability index.

When reviewing a challenge to the sufficiency of the evidence, we will affirm a judgment of punitive damages if, considering only the probative evidence and the reasonable inferences supporting it, without weighing evidence or assessing witness credibility, a reasonable trier of fact could find such damages proven by clear and convincing evidence. *Bud Wolf Chevrolet, Inc. v. Robertson*, 519 N.E.2d 135, 137 (Ind.1988).

Contending that the NHTSA rejected stability index as a predictor of rollover propensity, Ford asserts "NHTSA's determination conclusively negates the culpable mental state required to sustain a punitive sanction under Indiana law." Brief of Appellant at 46. First, we disagree with Ford's assertion. Although the NHTSA is not currently attempting to develop stability regulations, NHTSA has made clear in its statements to the public that stability issues are not to be discounted when investigating rollover propensity. *In re Ford Motor Co. Bronco II Products Liability Litigation*, 909 F.Supp. 400, 408 (E.D.La.1995). The agency has stated that cost-benefit considerations have been the primary consideration in opting not to promulgate such a standard. *Id.* In a 1987 report the NHTSA declared that it "believes it may be appropriate to consider rulemaking on vehicle rollover characteristics when its ongoing and planned research relating to stability and other aspects of the problem is completed." R. at 7611. Hence, the NHTSA's decision not to adopt a stability index standard has been the result of inconclusive and incomplete research, and not an outright rejection of a stability factor as an indicator of rollover propensity. Second, Ford's argument on this point presupposes that the Ammermans' punitive damages claim rested solely on stability index. That is not the case. As is evident from the trial court's jury instructions, the Ammermans' claim was based upon the premise that "Ford Motor Company acted willfully or wantonly with conscious disregard for probable injury, or with gross negligence regarding the manufacture of the 1986 Bronco II 4x4." R. at

11610-11. Stated differently this case proceeded to the jury on the theory that Ford manufactured a dangerous and defective product and in so doing Ford showed "utter indifference or conscious disregard of the rights of others," namely that its defective product would cause injury. *Id.* The stability index issue was but a single component, albeit an important one, in the Ammermans' overall claim.

We also disagree with Ford's second assertion that NHTSA's report issued after an investigation of the Bronco II precludes a finding that Ford acted with the requisite culpability on which a finding of punitive damages may rest. In support Ford cites cases from other jurisdictions which Ford contends stand for the proposition that compliance with federal regulations precludes a finding of punitive damages. We first observe the cases on which Ford relies do not support its position.[15] In any event, at present there are no federal regulations concerning rollover characteristics. Thus there were no federal regulations with which Ford was bound

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[15] *See, e.g., Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1059 (11th Cir.1994) (holding that compliance with NHTSA's regulations represents "some evidence" of due care and that wantonness is not present when a manufacturer takes steps to warn of possible danger); *Sloman v. Tambrands, Inc.*, 841 F.Supp. 699, 703 (D.Md.1993) (holding that under Maryland law "actual malice" was required for an award of punitive damages and because product complied with labeling regulations no actual malice was shown); *Chrysler Corp. v. Wolmer*, 499 So.2d 823, 826 (Fla.1986) (finding that a 1977 Plymouth Volare station wagon satisfied NHTSA standards on fuel system integrity in its compliance testing); *Miles v. Ford Motor Co.*, 922 S.W.2d 572, 589 (Tx.Ct.App.1996) (holding that Ford's reliance on NHTSA's studies concerning tension eliminators in safety belts weighed in favor of their use and that punitive damages were precluded where Ford used them in certain pickup trucks).

to comply. Further, the record is clear that the NHTSA investigation was essentially limited to examining documents Ford provided the agency. The record is clear also that Ford did not provide the agency with the results of its prototype testing, including the live testing conducted at the Arizona Proving Grounds in May 1982. During one such test Bronco II engineering prototypes tipped-up when exposed to sufficient side force, and the testing was suspended because of the danger it posed to the drivers. R. at 8809-11. Consequently, we cannot say NHTSA's conclusion would have been the same had Ford provided the agency with documentation concerning the prototype testing.

Finally Ford contends there was no clear and convincing evidence that it possessed an "evil state of mind" in the production of the Bronco II or that there was a "high degree of danger" that the Bronco II would roll over. Pointing to relevant case authority Ford argues a plaintiff must establish at least two critical facts in order to warrant punitive damages. First she must prove that the defendant acted "consciously, and with a highly reprehensible state of mind comparable to malice or wantonness, in producing injury." Brief of Appellant at 44 (citing *Orkin Exterminating Co. v. Traina*, 486 N.E.2d 1019, 1023 (Ind.1986)). Second, the plaintiff must establish that the defendants conduct involved "probable injury and a high degree of danger to the plaintiff, of which the defendant was fully aware." Brief of Appellant at 44 (citing *Picadilly, Inc. v. Colvin*, 519 N.E.2d 1217, 1221 (Ind.1988)). Ford then argues and attempts to demonstrate that neither element was satisfied in this case.

We have no quarrel with Ford's general statement of the law. However it is not the law controlling this case. Here, the trial court gave the following jury instruction on punitive damages:

> In order to recover the award of punitive damages the Plaintiffs claim, you must first find that they are entitled to recover damages for strict liability.

> Then, in addition, the Plaintiffs have the burden of proving the following proposition by clear and convincing evidence: Ford Motor Company acted willfully or wantonly with conscious disregard for probable injury, or with gross negligence regarding the manufacture of the 1986 Bronco II 4x4 in this case. . . . You are instructed that the following terms used in these Instructions with regard to the issue of punitive damages have the following meanings: Willful and wanton misconduct: A course of action which shows an actual or deliberate intention to cause injury or which, under existing conditions, shows either an utter indifference or conscious disregard for the rights of others. Gross negligence: The intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another, such a gross want of care and regard for the rights of others as to justify the willfulness and wantonness. Recklessness is characterized by reasonably . . . by highly unreasonable conduct or a gross departure from ordinary care, in a situation where a high degree of danger is apparent. A person acts recklessly when one disregards a substantial risk of danger, that either is known or would be apparent to a reasonable person in the same position.

R. at 11610-11. Ford did not object to the instruction at trial, nor does it challenge the instruction on appeal. Therefore the jury was bound to apply the facts of this case to the law as given to it by the trial court. Pursuant to the trial court's jury instructions, the Ammermans first had to show Ford was strictly liable in tort. Apparently they have carried that burden in that Ford does not challenge this point on appeal; nor does Ford challenge the award of compensatory damages. Second, pursuant to the trial court's instructions, the Ammermans could prove entitlement to punitive

damages on alternative grounds. More specifically they were required to prove by clear and convincing evidence that in the manufacture of the 1986 Bronco II 4x4, Ford engaged either in "a course of action which shows an actual or deliberate intention to cause injury, or [engaged in a course of action] which, under existing conditions, shows either an utter indifference or conscious disregard for the rights of others." R. at 11610-11 (emphasis added).

The trial court observed and we agree that the record shows:

> [t]he Bronco II's which rolled off the assembly line are dangerous and defective. Ford's knowledge of the defect cannot be reasonably questioned. The continued push to production of this product after all of the internal protestation to the contrary, is the crassest form of corporate indifference to the safety of the ultimate user or consumer and constitutes gross negligence.

Id. We believe the jury could have reached a similar conclusion. At the very least the evidence shows that in the manufacture of the 1986 Bronco II 4x4, Ford engaged in a course of action which, under existing conditions, showed an utter indifference for the rights of consumers.

Motion For Relief From Judgment

Following trial, Ford moved for relief from judgment pursuant to T.R. 60(B)(8). The trial court denied the motion. Ford claims it erred in so doing because certain tests performed by Hooker and Dr. Kaplan immediately after the trial contradicted Dr. Kaplan's trial testimony. More specifically a test performed in 1995 showed Hooker tipping a 1993 Jeep Cherokee. Ford maintained the test undermined Dr. Kaplan's testimony that a mid 1980s Jeep Cherokee with an SI of approximately 2.24 could not be made to tip. The 1993 Cherokee, however, neither was the same Cherokee nor equipped the same as the one used for the Ammerman trial. Ford then filed a supplement to its T.R. 60(B) motion

following a test conducted in 1996 during which Hooker tipped a Bronco 4x2 modified to meet Dr. Kaplan's stability-index standard. Ford asserted that this test contradicted testimony that the Bronco 4x4 could be modified to produce a safe vehicle. Ford argued that if the results of the 1995 and 1996 tests had been available at trial, the outcome would have been different because (1) the tests would have undermined Dr. Kaplan's testimony, and (2) the tests would have proven the test unreliable, and therefore, inadmissible.

Indiana Trial Rule 60(B)(8) provides for relief for reasons other than mistake, surprise, neglect, fraud, default without notice or grounds that could be rectified with a motion to correct error. T.R. 60(B)(8).[16] Relief is therefore justified only in exceptional circumstances. *Showalter v. Brubaker*, 650 N.E.2d 693, 699 (Ind.Ct.App.1995). When a motion for relief from judgment is filed, the burden is on the movant to demonstrate that relief is both necessary and just. *Levin v. Levin*, 645 N.E.2d 601, 604 (Ind.1994). The movant must show it has a good and meritorious defense to the cause of action. *Butler v. Shipshewana Auction, Inc.*, 697 N.E.2d 1285, 1289 (Ind.1998). A meritorious defense is one which shows a different result would be reached if the case were retried on the merits. *Id.* "The catalyst needed to obtain the proper relief is some admissible evidence which may be in the form of an affidavit, testimony of witnesses, or other evidence obtained through discovery." *Chelovich v. Ruff & Silvian Agency*, 551 N.E.2d 890, 892 (Ind.Ct.App.1990). The evidence must, as presented to the trial court, indicate

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[16] Trial Rule 60(B)(8) provides:

> On motion and upon such terms as are just the court may relieve a party or his legal representative from an entry of default, final order, or final judgment . . . for . . . any reason justifying relief from the operation of the judgment, other than those reasons set forth in sub-paragraphs (1), (2), (3), and (4).

the judgment would not remain unchanged, and an injustice would be foisted upon the defaulted party if the judgment is allowed to stand. *Id.* The decision of whether to deny a T.R. 60(B) motion is left to the equitable discretion of the trial court. *Levin*, 645 N.E.2d at 604. "In exercising its discretion, the trial court must balance the alleged injustice suffered by the party moving for relief against the interests of both the prevailing party and society generally in the finality of litigation." *Greengard v. Ind. Lawrence Bank*, 556 N.E.2d 1373, 1375 (Ind.Ct.App.1990). We will reverse the trial court's grant or denial of the motion only upon a clear showing of an abuse of discretion. *Lake County Trust v. Highland Plan Comm'n*, 674 N.E.2d 626, 628 (Ind.Ct.App.1996), *trans. denied.* An abuse of discretion occurs when the trial court's judgment is clearly against the logic and effect of the facts and inferences supporting the judgment for relief. *Id.* We will not reweigh the evidence in conducting this review. *Levin*, 645 N.E.2d at 604.

Ford contends the two subsequent tests justify setting aside the judgment. Ford argues the new information would result in a different judgment by undermining Dr. Kaplan's testimony in the eyes of the jury and by rendering Dr. Kaplan's testimony inadmissible. The tests at issue utilized different vehicles than those used in the tests conducted on behalf of the Ammermans.[17] The later tests, therefore, are

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[17] The Cherokee used for the Ammermans' test was a 1985 Cherokee equipped and tested with P205/75R15 tires. P205/75R15 tires are smaller than the P225/75R15 tires found on the 1993 Cherokee. According to trial testimony, a larger tire size impacts a vehicle's tendency to rollover by increasing the vehicle's center of gravity. Dr. Kaplan testified at trial that the 1985 Cherokee equipped with P205 tires did not tip.

In 1996, Dr. Kaplan and Hooker tested a modified Bronco 4x2 whereas they tested a Bronco 4x4 for the Ammermans' case. In fact, the trial court found any testing

not comparable to the original tests. Furthermore, the trial court and jury considered extensive testimony and evidence critical of Dr. Kaplan's test and stability index theory. The 1995 and 1996 tests thus would amount to nothing more than cumulative evidence. Consequently, the results are not so exceptional as to justify extraordinary relief pursuant to T.R. 60(B)(8).

Ford must also demonstrate that there is admissible evidence of a meritorious defense against the Ammermans. *See Butler v. Shipshewana Auction Inc.*, 697 N.E.2d at 1289. Hence, Ford must present evidence demonstrating a different result would be reached if the case were retried on the merits. *See id.* The only evidence available to Ford is the 1995 and 1996 test results. We agree with the trial court that these results are not outcome determinative. Ford had numerous occasions to challenge Dr. Kaplan's testimony and did so. As the trial court pointed out, Ford "had ample opportunity to impeach the results of the Kaplan/Hooker tests through their own experts, testing and facilities." R. at 5124. The jury was free to weigh the evidence presented by both Ford and the Ammermans. The evidence considered included that regarding Dr. Kaplan's stability index theory as well as the test itself. Clearly, the jury gave more weight to the Ammermans' evidence. In addition, the trial court considered and weighed the evidence presented in determining the Ammermans laid a sufficient foundation for the admissibility of Dr. Kaplan's test. The tests at issue here would simply go to the weight and credibility of the evidence, not to its admissibility. Given the vast amounts of evidence and testimony presented at trial, we cannot say that the 1995 and 1996 tests would result in a judgment different from the one here.

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conducted with the Bronco 4x2 immaterial due to its dissimilarities to the Bronco 4x4. The trial court therefore granted Ford's Motion in Limine preventing any discussion of the Bronco 4x2 during the trial.

In sum, Ford has failed to show that relief is necessary and just. Based upon the facts before us, we cannot say an abuse of discretion has occurred. The trial court found and we agree that the test results would not have altered the trial's outcome. The trial court's judgment is supported by the evidence, and we decline to disturb its decision.

Reduction of the Jury's Award and the Ammermans' Cross-Appeal

During closing argument counsel for the Ammermans offered the jury three alternative methods for computing punitive damages: (1) triple the amount of the compensatory damages, (2) multiply the sum of $83.00 [the money Ford saved on each Bronco II by failing to make it safe] by 468,000 [the number of Bronco IIs Ford anticipated selling], or (3) multiply the sum of $83.00 by 700,000 [the number of Bronco IIs Ford actually sold].[18] R. at 11455-56. The jury eventually awarded Lana and Pamela equal shares of $58 million. Noting the third alternative would render an award of $58.1 million, the trial court concluded the jury must have adopted the third alternative in awarding punitive damages. Relying on *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), the trial court also concluded that the jury's award unwittingly offended the U.S. Constitution because it was based on the number of Bronco IIs Ford sold worldwide. Accordingly, the trial court reduced the $58 million award to $13.8 million, which represented Ford's retooling costs, along with an additional $54.00 representing the cost for additional hardware installed on each vehicle.

Without conceding that any award of punitive damages is warranted in this case, Ford contends that even as remitted the award is still excessive. According to Ford, the award violates the due process clause of the United States

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[18] We note in passing that Ford did not object to counsel's invitation to the jury.

Constitution as well as Indiana common law and the proportional penalties clause of the Indiana Constitution.[19] On cross-appeal the Ammermans complain the trial court erred in remitting the collective $58 million punitive damages award to $13.8054 million.

The trial court reduced the award pursuant to Indiana Trial Rule 59(J)(5) which provides in relevant part that a trial court may "[i]n the case of excessive or inadequate damages, enter final judgment on the evidence for the amount of the proper damages. . . ." T.R. 59(J)(5). This remedy is available only where as a matter of law the evidence is not sufficient to support the verdict. *Carbone v. Schwarte*, 629 N.E.2d 1259, 1261 (Ind.Ct.App.1994). In determining whether the trial court properly entered final judgment on the evidence, this court employs the same standard as the trial court. *Id.* That is, we must determine whether the evidence is insufficient to support the verdict as a matter of law. In so doing, we must consider only the evidence and reasonable inferences favorable to the non- moving party; we may not weigh conflicting evidence or judge witness credibility. *Id.*

In *Gore* the U.S. Supreme Court examined the question of whether a $2 million punitive damages award was grossly excessive and thus violative of the Due Process Clause of the Fourteenth Amendment. The underlying facts of that case are these. Dr. Ira Gore purchased a new BMW automobile and discovered the car had been repainted. He sued the American distributor of BMW alleging, among other things, that the failure to disclose the repainting constituted fraud

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[19] Article I § 16 of the Indiana Constitution provides "Excessive bail shall not be required. Excessive fines shall not be imposed. Cruel and unusual punishments shall not be inflicted. All penalties shall be proportionate to the nature of the offense." Other than quoting a portion of Article I § 16 Ford does not elaborate further on its Indiana constitutional argument.

under Alabama law. At trial BMW acknowledged that it followed a nationwide policy of not advising its dealers, and hence their customers, of pre-delivery damage to new cars when the cost of repair did not exceed three percent of the car's suggested retail price. Gore's vehicle fell into that category. The jury returned a verdict finding BMW liable for compensatory damages of $4,000.00 and assessed $4 million in punitive damages. On appeal the Alabama Supreme Court reduced the punitive damages award to $2 million, finding the jury "improperly computed the amount of punitive damages by multiplying Dr. Gore's compensatory damages by the number of similar sales in other jurisdictions."[20] *Id.* 116 S.Ct. at 1595.

On appeal, the U.S. Supreme Court recognized that punitive damages may be imposed to further a state's legitimate interests in punishing unlawful conduct and deterring its repetition. *Id.* However, when an award is

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[20] The Alabama Supreme Court reached this conclusion based upon a record that revealed Gore's counsel made the following closing argument:

> They've taken advantage of nine hundred other people on those cars that were worth more. . . . If what Mr. Cox said is true, they have profited some four million dollars on those automobiles. Four million dollars profits that they have made that were wrongfully taken from people. That's wrong, ladies and gentlemen. They ought not be permitted to keep that. You ought to do something about it . . . I urge each and every one of you and hope that each and every one of you have the courage to do something about it. Because, ladies and gentlemen, I ask you to return a verdict of four million dollars in this case to stop it.

BMW of North America, Inc. v. Gore, 646 So.2d 619, 627 (Ala.1994).

grossly excessive in relationship to those interests it violates the due process clause of the Fourteenth Amendment. *Id.* The Court noted that a state may protect its citizens by prohibiting deceptive trade practices and requiring automobile distributors to disclose pre-delivery repairs which influence the value of a new car. However, the record reflected that there was no uniform method of protecting those interests throughout the states. The Court described the status of the law in this regard as a "patchwork of rules representing the diverse policy judgments of lawmakers in 50 States." *Id.* at 1596. In essence, the non-disclosure of pre-delivery repairs was not an activity that was unlawful in all states. The Court then concluded "[a] State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasor's lawful conduct in other states." *Id.* at 1597. It is this latter quote upon which the trial court in this case relied in reducing the punitive damages award from $58 million to a little over $13.8 million.

The Ammermans complain the trial court erred in reducing the jury award because: (1) the decision to remit presupposes that the jury's award was based upon a multiplication of $83.00 times the 700,000 Bronco IIs Ford sold nationwide, and (2) the Gore quote refers specifically to conduct that is "lawful" in other jurisdictions.[21] As for the former, the Ammermans point out there was evidence before the jury concerning Ford's profits and net worth. Specifically, the jury's award represented slightly more than 1% of Ford's $5.3 billion in net profit for 1984. As for the

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[21] In a footnote the Supreme Court observed "[g]iven that the verdict was based in part on out-of-state conduct that was lawful where it occurred, we need not consider whether one State may properly attempt to change a tortfeasor's unlawful conduct in another State." *Gore*, 116 S.Ct. at 1598, n. 20 (emphasis in the original).

latter, the Ammermans argue that manufacturing a defective product does not represent lawful conduct in any jurisdiction.

We agree with the Ammermans there was evidence before the jury concerning Ford's net profits. The law is settled that a fact-finder may consider a tortfeasor's financial condition when determining punitive damages. *Ramada Hotel Operating Co. v. Shaffer*, 576 N.E.2d 1264, 1268 (Ind.Ct.App.1991) ("Based upon the theory that it will take a greater penalty to dissuade the rich than the poor from oppressive conduct, the wealth of the defendant may be shown so that the jury will assess damages which will punish it."). However, the record is clear that in closing arguments before the jury counsel for the Ammermans did not focus on Ford's net profits as a basis for punitive damages. Rather, counsel invited the jury to return an award of punitive damages based on alternatives that would punish Ford for conduct occurring beyond the borders of this State.[22] The

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[22] In closing arguments, after discussing Ford's profits and net worth, counsel for the Ammermans stated the following with reference to punitive damages:

> How do you make an impression on a company of this size. . . . If its a food service worker, would you hesitate to award Five Dollars and Fifty Cents ($5.50) for one hour. No. There are three ways that I thought up to suggest to you . . . these are suggestions. This is your business. One is to triple the compensatory damages. Whatever award that you make for each of these girls, you triple it for the punitive damages. The second is to take that number, that Eighty-three Dollars ($83.00) a unit that we know they saved, that two and a half percent of that additional profit that Ford made, and multiply it times the 468,000 units they anticipated. And I did the math last night and it is Thirty-eight Million Nine Hundred and Forty- Four Thousand dollars ($38,944,000). . . . The other way is to take

jury complied. Gore prohibits extra-territorial sanctions and as such the trial court properly determined that the jury's punitive damages award unwittingly offended the U.S. Constitution.

The Ammermans insist that Gore prohibits a State from imposing sanctions for a tortfeasor's conduct that is lawful in another State. According to the Ammermans, placing a dangerous and defective product into the stream of commerce is unlawful in every state of the union. Pointing to favorable jury verdicts in other jurisdictions Ford counters there is "not a shred of evidence suggesting that the distribution of Bronco IIs was unlawful in any other state." Brief of Appellant at 66. We assume that no jurisdiction condones the sale of defective products. Nonetheless it is up to each jurisdiction to make that determination for itself. Thus we need not explore whether the sale of Ford's Bronco IIs are unlawful in other states. An Indiana jury has determined that Ford has transgressed the laws of this State. Thus any punitive damages award should be limited to protecting this State's consumers. We conclude therefore that as a matter of law the evidence in this case was not sufficient to support an award of punitive damages in the amount of $58 million. The trial court properly reduced the award under the provisions of T.R. 59(J)(5).

Concerning Ford's argument that even as remitted the award is still unconstitutionally excessive, we disagree. In addition to criticizing the extra-territorial nature of a punitive

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> that same number times the number of vehicles that they actually sold and say to Ford Motor Company, we are going to take away from you this time, so you never do this again, the profit that you should not have earned on the Bronco II. We're going to take it away from you.' Fifty-eight Million One Hundred Thousand Dollars ($58,100,000).

R. at 11455-56.

damages award that is inconsistent with the principles of state sovereignty and comity, the Gore Court also specifically set forth three "guideposts" to determine whether an award is grossly excessive: (1) the degree of reprehensibility of the conduct at issue, (2) the disparity between the harm or potential harm suffered by the complaining party and the punitive damages the complaining party received, and (3) the difference between the punitive damages remedy and the civil penalties authorized or imposed in comparable cases. Id. at 1598-99. We employ the same test here. Only if the guideposts demonstrate that Ford did not receive adequate notice of the magnitude of the sanction that this state might impose for the willful manufacture and distribution of a defective product, can we then say that the $13.8 million punitive damages award is grossly excessive.

Reprehensibility

As Gore makes clear "Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." 517 U.S. at 575, 116 S.Ct. at 1599. It is apparent to this court that Ford was motivated by profits rather than safety when it put into the stream of commerce a vehicle which it knew was dangerous and defective. Ignoring its own data and the advice of its engineers, Ford manufactured a vehicle prone to rollover accidents in spite of being aware that such accidents result in more serious injury than any other. The trial court characterized Ford's conduct as "the crassest form of corporate indifference." R. at 11610-11. We conclude that Ford's conduct was highly reprehensible as well.

Disparity between harm suffered and damages received

Dr. Gore's injury was purely economic and resulted in a compensatory award of $4,000.00. Striking down the $2 million punitive damages award the U.S. Supreme Court noted there must exist a "reasonable relationship" between the injury suffered and the damages received. The court

observed "when the ratio is a breathtaking 500 to 1 . . . the award must surely raise a suspicious judicial eyebrow." *Gore*, 116 S.Ct. at 1603. Even so, the Court reiterated its refusal to draw any type of "mathematical bright line between the constitutionally acceptable and constitutionally unacceptable that would fit every case." *Gore*, 517 U.S. at 582-83, 116 S.Ct. at 1602.

Unlike Gore the injuries suffered by the plaintiffs in this case are physical, permanent, and severe. And in the case of Pamela the injuries are psychological and emotional as well. In its order of remittitur the trial court awarded Pamela $10,900,027.00 and awarded Lana $7,300,027.00. The award Pamela received in punitive damages is less than 3 times the amount of her $4 million compensatory award. As for Lana the award of punitive damages is a little more than 18 times the amount of her $400,000.00 compensatory award. Neither ratio in our view "raise[s] a suspicious judicial eyebrow." To the contrary both ratios bear a reasonable relationship to the injuries the women suffered and the award they received. It is also instructive that the U.S. Supreme Court has sustained awards of punitive damages where the ratio to compensatory damages far exceeded those in this case. *See, e.g., Browning-Ferris Industries of Vermont Inc. v. Kelco Disposal Inc.*, 492 U.S. 257, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989) (upholding a $6 million punitive damages award where compensatory damages totaled of $51,146.00--a ratio of 117 to 1--on a claim of anti-trust violation and interference with contractual rights); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993) (upholding a $10 million punitive damages award where compensatory damages totaled $19,000.00--a ratio of 526 to 1--on a common-law slander of title action).

Sanctions for comparable misconduct

Comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable

misconduct provides a third indicium of excessiveness. *Gore*, 517 U.S. at 583, 116 S.Ct. 1589. In *Gore* the conduct of the defendant was comparable to a violation of Alabama's Deceptive Trade Practices Act which carried a maximum civil penalty of $2,000.00. The Court noted that the $2 million punitive damages award was "substantially greater than the statutory fines available in Alabama and elsewhere for similar malfeasance." *Id.* In this case however there is no comparable civil statutory penalty for the manufacture and sale of a defective product. The same is true for criminal penalties.[23] Thus this portion of the *Gore* indicia of excessiveness is not applicable. In any event in the same context the court also observed "[m]oreover, at the time BMW's policy was first challenged, there does not appear to have been any judicial decision in Alabama or elsewhere indicating that application of [a Deceptive Trade Practices Act] might give rise to such severe punishment." *Id.* (emphasis added). Here, Ford complains that nothing in Indiana's judicial history could have provided it with fair notice that such a huge award of punitive damages would be assessed. We disagree.

In this jurisdiction we will not reverse an award of damages as being excessive unless the damages appear so unreasonable as to convince us the jury was motivated by passion or prejudice. *Archem, Inc. v. Simo*, 549 N.E.2d 1054, 1061 (Ind.Ct.App.1990), *cert. dismissed*, 498 U.S. 1076, 111 S.Ct. 944, 112 L.Ed.2d 1032 (1991). A high ratio of punitive damages alone will not be grounds to reverse an award of punitive damages. *Id.* The purpose of punitive damages is to punish the wrongdoer and thereby deter others from engaging in similar conduct in the future. *Id.* When reviewing an award of punitive damages we consider two

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[23] Ford contends the analogous conduct in this case is that of criminal recklessness. Brief of Appellant at 74. The Class D felony offense carries a maximum monetary fine of $10,000.00.

primary factors. First, the nature of the tort and the extent of the actual damages sustained should be considered. Second, the economic wealth of the defendant should be considered. *Indiana & Michigan Elec. Co. v. Stevenson*, 173 Ind.App. 329, 363 N.E.2d 1254, 1263 (1977), *trans. denied*; *Bright v. Kuehl*, 650 N.E.2d 311, 316 (Ind.Ct.App.1995), *reh'g denied.*

This case was presented to the jury on the Ammermans' assertion of strict liability in tort pursuant to Indiana's Product Liability Act. *See* Ind.Code § 33-1-1.5-1 to 33-1-1.5-5.[24] Liability for injury under the Act is premised on the claim that the product in question is in a defective condition unreasonably dangerous. *Id.*; *Rupert v. Mach. Tool Corp.*, 661 N.E.2d 826, 827 (Ind.Ct.App.1995). As we have previously observed no issue has been raised in this appeal challenging whether the Ammermans carried their burden of proving that Ford put into the stream of commerce a vehicle that was in a defective condition unreasonably dangerous. The question posed is whether Ford did so "willfully or wantonly with conscious disregard for probable injury, or with gross negligence. . . ." R. at 11610. "Willful and wanton misconduct" is defined as "a course of action which shows actual or deliberate intention to cause harm or which, under existing conditions, shows either an utter indifference or conscious disregard for the rights of others." Id. The record shows that Ford was aware that rollover accidents "tend [ ] to be more serious than any others." R. at 8483 (cross examination of Ford executive). Although Ford protests loudly to the contrary, the record also shows the jury had before it clear and convincing evidence from which it could conclude that in the manufacture of the 1986 Bronco II 4x4 Ford acted willfully and wantonly in that Ford "show[ed] either an utter indifference or conscious disregard for the rights of others." R. at 11611.

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[24] Repealed by P.L. 1-1998 § 15. Now see Ind.Code §§ 34-20-1-1 to 34-20-9-1.

In *Emerson v. Markle*, 539 N.E.2d 35 (Ind.Ct.App.1989) this court upheld punitive damages of $150,000 where the compensatory award totaled $1,000--a ratio of 150 to 1--when the defendant had been found to have launched a crusade to "intentionally and maliciously" destroy the plaintiff's reputation and career. Id. at 40. For similar conduct, in Archem we upheld punitive damages of $750,000 where the compensatory award totaled $11,000--a ratio of 68 to 1. Ford's conduct in this case was willful and wanton. In our view Ford knew or should have known that an award of punitive damages could have resulted in a ratio as high as 100 to 1. *See Emerson*, 539 N.E.2d 35. That is especially so given that Ford's economic wealth ($219 billion in total assets, $21.7 billion in net worth, and $5.3 billion in net profits) is a factor to be considered in assessing punitive damages. *See, e.g., Dow Chemical v. St. Vincent Hosp.*, 553 N.E.2d 144 (Ind.Ct.App. 1990) (finding appellant's total assets of $14.356 billion sufficient to sustain a punitive damages award of $5 million). We conclude that as remitted the award of punitive damages was not excessive.

Judgment affirmed.

SHARPNACK, C.J., and GARRARD, J., concur.

FORD MOTOR COMPANY –V– AMMERMAN, VICKI, ET AL

INDIANA SUPREME COURT

STATE OF INDIANA

217 STATE HOUSE
INDIANAPOLIS, IN 46204

Cause Number

49A05-9608-CV-00322
Lower Court Number:
49D059311CT1305

You are hereby notified that the SUPREME COURT has on this day 10/21/99

THIS MATTER COMES BEFORE THE INDIANA SUPREME COURT ON A PETITION TO TRANSFER FROM A DECISION OF THE COURT OF APPEALS, PURSUANT TO INDIANA APPELLATE RULE 11(B). THE COURT HAS REVIEWED THE DECISION OF THE COURT OF APPEALS, THE RECORD OF PROCEEDINGS, THE BRIEFS WHICH WERE FILED IN THE COURT OF APPEALS, AND THE MATERIALS WHICH WERE SUBMITTED IN CONNECTION WITH THE REQUEST TO TRANSFER JURISDICTION. EACH MEMBER OF THE COURT HAS VOTED ON THE CASE. EACH MEMBER OF THE COURT HAS HAD THE OPPORTUNITY TO VOICE THAT JUSTICES VIEWS ON THE APPEAL IN CONFERENCE WITH THE OTHER JUSTICES.

BEING DULY ADVISED, THE COURT NOW DENIES THE APPELLANT'S PETITION TO TRANSFER.

RANDALL T. SHEPARD, CHIEF JUSTICE

ALL JUSTICES CONCUR, EXCEPT BOEHM, J., WHO VOTES TO GRANT

TRANSFER.

KM

WITNESS may name and the seal of said Court,
This 21ST day of OCTOBER, 1999

/s/ Brian Bishop
Clerk Supreme Court, Court of Appeals and Tax Court

FORD MOTOR COMPANY –V– AMMERMAN, VICKI, ET AL

INDIANA SUPREME COURT

STATE OF INDIANA

217 STATE HOUSE
INDIANAPOLIS, IN 46204

Cause Number

49A05-9608-CV-00322
Lower Court Number:
49D059311CT1305

You are hereby notified that the COURT OF APPEALS has on this day 4/07/99

APPELLANT'S PETITION FOR REHEARING DENIED.
JOHN T. SHARPNACK, CHIEF JUDGE AA

WITNESS may name and the seal of said Court,
This 21ST day of OCTOBER, 1999

/s/ Brian Bishop
Clerk Supreme Court, Court of Appeals and Tax Court

VICKI AMMERMAN, Guardian of PAMELA AMMERMAN, and LANA L. AMMERMAN,
Plaintiffs,

v.

FORD MOTOR COMPANY,
Defendant.

CAUSE NO. 49D05-9311-CT-1305

IN THE MARION SUPERIOR COURT CIVIL DIVISION, ROOM 5

STATE OF INDIANA
COUNTY OF MARION

ENTRY ON DEFENDANT'S MOTION TO CORRECT ERRORS AND ON DEFENDANT'S T.R. 60(B) MOTION

This cause was tried to a jury in a solitary proceeding upon the Plaintiffs' Complaint for strict liability in tort, and for punitive damages. This Court has considered over 30 pre-trial motions fully briefed by the parties, spent 17 days in trial, considered over 1,500 pages of briefs and documents in support of the Defendant's post-trial motions and has conducted a post-trial hearing regarding the efficacy of the jury's punitive damage award and the matters set forth in the Defendant's Motion for Relief from Judgment. Defendant filed an addendum to its first 60(B) motion on May 30, 1996, and filed its second 60(B) motion on July 1, 1996.

The jury returned a verdict on October 31, 1995, for compensatory damages in the amount of Four Hundred Thousand Dollars ($400,000.00) to Lana Ammerman and for Four Million Dollars ($4,000,000.00) to Pamela Ammerman upon the strict liability in tort theory posited by the Plaintiffs. In addition, the jury awarded punitive damages in the amount of Fifty Eight Million Dollars ($58,000,000.00).

This is the largest punitive damage award ever given by an Indiana jury. After hundreds of hours of deliberation and study, this Court now embarks upon a review of the jury's award and upon the merits of the Defendant's Motions for Relief from Judgment. Therefore, this Court finds and orders the following:

STATEMENT OF RELEVANT FACTS

Fred Watkins was driving a borrowed 1986 Ford Bronco II 4x4 sport utility vehicle in Rush County, Indiana, on a rural, two-lane highway. His passengers were the Plaintiffs, Pamela and Lana Ammerman. Watkins pulled out to pass two slower moving vehicles. The first vehicle in front of him also started to pass causing Watkins to take evasive actions. The evasive actions resulted in the vehicle rolling over three times on a flat, dry pavement. Pamela and Lana Ammerman were ejected from the vehicle and both suffered serious, life threatening injuries.

In approximately October of 1980, Ford Motor Company decided to pursue the potentially lucrative market of compact or sport utility vehicle manufacture. The initial decision was to use their existing compact pickup truck, known as the Ranger, as the basis for developing their new product. Ford managers were aware that General Motors had planned to introduce a competitive sport utility vehicle in September of 1982 at the beginning of the 1983 model year. Ford decided to enter the sport utility vehicle market and set mid-January 1983 as its market production date. Ford internal documents refer to the production date as "Job #1." Making its sport utility vehicle as derivative of the compact Ranger pickup fit perfectly with Ford's expedited development schedule because the sport utility vehicle built upon the same chassis as the Ranger and the "package" would be nearly identical to Ranger from the "B" pillar forward. The derivative approach also offered Ford the highest profit of any alternative considered, i.e., $3,570.00 per vehicle.

American Motors Company had beaten the big three auto manufacturers to the compact utility market with its Jeep CJ-7. Ford used the CJ-7 as its "image vehicle." A few weeks

after Ford's decision to build the Bronco II "Sixty Minutes" aired an investigative report which alleged a substantial roll-over propensity in the Jeep CJ-5 and CJ-7. Ford engineers were aware of the "Sixty Minutes" report, and on February 3, 1981, were concerned that the Bronco II's ability to avoid roll-over was below competitive vehicles. These opinions were based upon general principles of physics and not upon any real world testing.

On February 5, 1981, Ford engineers responded with five proposed solutions to the perceived stability problem. The first two proposals did not affect the prototype Ranger derivative package. Proposals three, four and five involved "significant vehicle tear-up" and substantial costs. Proposals one and two could be done within the framework of the proposed Job #1 date. Proposals three, four and five would result in a delay in production. Ford management chose proposal number two, which was tested on track during the summer and fall of 1981 at the Arizona Proving Grounds. These tests were conducted by Ford's test drivers and produced unsatisfactory results because the prototypes tipped up when exposed to sufficient side forces. The testing had to be suspended due to extreme dangers posited upon the test drivers. Again, the test engineers reported a need to widen the track (width of vehicle from tire to tire) and to lower the center of gravity. This was not feasible according to Mr. McClure, because the "package constraints" of the proposed production vehicle precluded widening the Bronco II track. Ford engineers predicted a major improvement in stability if the track of the vehicle were widened three to four inches, but Ford management refused to heed these recommendations. It is apparent that Ford's management was driven by a conscious decision to adhere to the Job #1 production date.

Ford conducted no further pre-production on-road safety testing of the Bronco II. Ford did redesign the vehicle's stabilizer bars and tested these on a new computer program (ADAMS) which showed the modified vehicle performing successful J turn test at 55 miles per hour. This was the first time Ford Motor Company had ever used the ADAMS

computer simulation. The ADAMS computer program did predict front wheel lift of the Bronco II at 32 miles per hour in the single-lane avoidance maneuver test used by the Insurance Institute of Highway Safety. Ford did later conduct on-road handling tests at its Dearborn Proving Grounds pursuant to its internal test procedures, but these tests were designed to measure aesthetic handling characteristics of the vehicle during relatively normal driving conditions. These tests bore little, if any, relation to the testing done at the Arizona Proving Ground, which tested the ability of the vehicle to handle extreme conditions which are seldom experienced by drivers or vehicles. Ford and other automobile manufacturers have routinely relied upon limits tests and handling tests like Ford's P6-101 test in evaluating their vehicles prior to production.

On May 28, 1982, seven and one-half months before Job #1, Ford collected all documents relating to Bronco II handling characteristics. This is the first time in Ford history that they had gathered engineering documents relating to any particular vehicle prior to production. All documents were maintained in a single location. These documents were reviewed by Ford employees with the intent to "close the loop of vehicle documentation." This process was internally called "sanitization." The review process resulted in some documents being commented upon in margin notes by the reviewers. One hundred and thirteen documents were classified as critical. Fifty-three of these critical documents have disappeared. One of those documents is an "assessment update" which was issued two months before Job #1, which, ostensibly, listed on the "attachment two" seven major risks due to incomplete testing of Bronco II. Attachment two was never found nor produced to the Plaintiffs during this action.

When Chevy's S-10 Blazer was available for sale in September 1982, Ford realized that its production level Bronco II had a static stability index which was worse than Chevrolet's product. This was only three months prior to the Job #1 deadline, and Ford engineers scrambled for ways to increase weight below the center of gravity to improve its

stability index number. Ford increased the size of its gas tank from 17 to 23 gallons, adding 38 lbs. of weight below the center of gravity (presuming a full tank of gasoline). Ford added sealant to the tires, which added 8 lbs. of weight below the center of gravity. Ford also widened its track 4/10th of an inch, even though Ford engineers had previously stated that widening the track one (1) inch would have no effect upon the relative stability of the vehicle.

As early as 1973, Ford Motor Company declared to the National Highway Traffic Safety Administration (NHTSA) that its passenger vehicles must be forgiving of unskilled drivers, which may use panic motivated evasive maneuvers. They stated that Ford cars are designed to slide out, rather than roll over on flat, dry pavement. These were Ford's design goals for its passenger cars which were later deemed appropriate for its proposed sport utility vehicle, the Bronco II. This report to NHTSA is framed in the present tense, rather than the future tense, implying that Ford vehicles at that time slide out, rather than roll over. This implies that a "feasible" design existed for Ford's passenger vehicles as far back as 1973. Therefore, Ford knew that the design safety goals upon which Mr. Parrill and Mr. Antoun testified at trial were a condition precedent to the delivery of a reasonably safe vehicle to the streets of America. Upon the date of the first manufacture of Bronco II, and upon the date of the manufacture of the Ford Bronco II in question in this case, Ford Motor Company could not know whether their Bronco II production vehicle met these design standards, because it failed to test the vehicle in limits avoidance maneuvers. Furthermore, the overwhelming weight of the evidence indicates Ford should have known the production vehicle would not meet these design standards.

All of the above facts were known or should have been known by Ford Motor Company prior to the production of the first Ford Bronco II motor vehicle for sale to the public.

After the Job #1 deadline was met, and before the manufacture of the Bronco vehicle driven by Mr. Watkins in this case, the Defendant, Ford Motor Company, knew or

should have known several additional facts which are set out herein below.

The Ford Bronco II had a shorter wheel base than competing vehicles in the sport utility classification. The shorter wheel base made the vehicle subject to under-steer. Additionally, Ford compared the Bronco II to its main competitor, the Chevy Blazer S-10 in early 1982 and found that the Bronco was 3.3 inches higher, and that the Blazer had greater ground clearance and a lower center of gravity. The Ranger derivative design implemented a twin I-beam suspension. Use of McPhearson struts would have allowed the Bronco II engine to be lowered by 1-1/4 inches, increasing the static stability index of the vehicle. Use of the twin I-beam suspension contributed to a phenomenon known as "jacking," which is the lifting of a front wheel off the ground when exposed to sufficient lateral forces. This jacking phenomenon reduced the dynamic stability of the Bronco II.

After the production of the 1986 Bronco II in question, but before the accident on August 2, 1991, certain actions were taken by and certain facts became known to Ford. In 1989, Ford tested the Bronco II with the twin I-beam suspension and discovered high levels of jacking almost ten times greater than its main competitor, the Blazer S-10. There were no changes to the track width or center of gravity height during the seven years that the Bronco I was placed in production.

A response to a NHTSA request for information in response to the Raines petition shows that Ford Motor Company did not disclose all reports and tests to NHTSA as was requested.

In April, 1989, Ford engineers visited the offices of Consumer's Union to discuss Bronco II's safety and stated in an internal memorandum that they had "clouded their minds, loosened some conclusions, . . . and sent them off to search for additional information which may work to our advantage."

The accident occurred on August 2, 1991, resulting in serious bodily injuries to both Plaintiffs. Pamela sustained a crushed pelvis and closed head injuries, along with several additional fractures. She has the permanent mental capacity of a 12 to 13 year old girl. She suffers from left-sided spaticity and limited function of her left extremities. Her left hand is maintained in a claw-like position, and she must walk on the outside of her left ankle. She suffers from severe emotional and mental problems, which have included episodes of depression, including attempted suicide. Lana had a severe femoral fracture, which required a rod to be inserted to stabilize the bone. She suffered a crushed eye socket, which required extensive reconstructive surgery. Her skin and scalp were severely lacerated. She is permanently scarred and disfigured and suffers from an unsteady gait. Both Plaintiffs were very nearly killed by the accident and were saved by some extraordinary emergency medical treatment.

DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT

Ford has requested relief from the judgment entered in this case pursuant to the rarely used provisions of T.R. 60(B)(8). This Court is cognizant of the differences between sections 2 and 8 of the rule, and agrees that the information gleaned by the Defendant is not "newly discovered evidence." At issue is whether information not in existence at trial casts a substantial doubt on the judgment.

The original motion relates to tests immediately after this judgment in 1995, conducted by one of the Plaintiffs' experts, Robert Hooker. These tests show a 1993 Jeep Cherokee tipping up even though Hooker and others testified the Jeep had never tipped up. A subsequent filing relates to an April 2, 1996 Hooker test which ostensibly shows a modified Bronco II 2x4 (the vehicle in this case was a 4x4) tipping up at relatively low speeds.

The essence of any T.R. 60(B)(8) motion is whether the information was obtained inadvertently and not as an

offensive maneuver, and whether the information will reasonably and probably alter the result of the litigation. *State ex rel. Huppert v. Pasche*, 637 N.E.2d 1050 (Ind. App. 1994), *Fairrow v. Fairrow*, 559 N.E.2d 597 (Ind. 1990). In *Huppert*, a report was released in due course by the Township Board after the judgment. The report raised questions of fact which would have prevented the trial court from granting summary judgment. In *Fairrow* (a case also from this Court), a routine blood test nine years after the judicial finding of paternity excluded the "father" as a parent of the child. In each case, the outcome was undoubtedly changed below upon the discovery of the subsequent information.

Ford contends on two (2) fronts that the result of this trial would have been different had the 1995 Hooker Cherokee tests been introduced at this trial. First, the jury would have seen that a Cherokee did tip up, undermining Hooker's and Kaplan's testimony and the Plaintiffs' feasibility theory. Then the judge would have seen the counter-steer inputs and changed his mind regarding the admissibility of the Hooker/Kaplan test methodology pursuant to I.R.E. 702(b) and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993).

The Defendant knew about the Kaplan/Hooker tests since 1993. They were also invited to observe the testing and declined. Through the extensive discovery in this case, the Defendant should have known what the methods used by Kaplan and Hooker were going to be and what their testimony at trial was going to be. Given the vast resources dedicated to this matter by Ford, it is quite apparent that they had ample opportunity to impeach the results of the Kaplan/Hooker tests through their own experts, testing and facilities. Specifically, knowing full well that Dr. Kaplan was going to testify that no one had gotten the Cherokee to tip up, Ford had available to it the resources to challenge that notion.

Even if the Cherokee tests had been in existence, they would not have altered the result of this trial. These results would have been merely impeaching and not clearly outcome determinative. As the Plaintiffs point out, the Cherokee tested in 1995 by Hooker was a different vehicle and differently equipped than the one in the original tests. The salient fact remains that a comparable vehicle (1985 Jeep Cherokee originally tested) which was in production could be exposed to radical steering inputs and lateral forces resulting in sliding out, rather than tipping up, i.e., it complied with Ford's own safety design goals. Nothing in the 1995 testing changes this fact.

At the May 9, 1996 hearing, Ford emphasized the counter steering inputs used in the test as evidence of the *Daubert* repeatability problem. The court has already ruled on this issue during the trial and sees no reason to change its former ruling admitting these tests into evidence. The automotive industry uses human test drivers to test the subjective qualities and safety of their vehicles. After all, humans are the consumers of their products. Furthermore, the industry tests the outside limits of their products with test drivers and did so in this case. The Defendant said it was designing vehicles which would slide out under panic situations, and the Hooker/Kaplan tests simulated a panic situation as best as could be done, given the extreme nature of the test and the fact that it is being performed by human beings. The Court will not engage in an entire review of *Daubert* here, but suffice it to say the Court finds that the 1995 Cherokee test would have had no affect upon its prior rulings on the admissibility of the Hooker/Kaplan tests at trial.

The Defendant conducted extensive cross-examination on the counter steer inputs. The graphic illustrations of this point in the tapes introduced in the May 9, 1995 hearing may have been effective additional cross-examination. However, the point was made at trial that wild steering inputs caused the tip ups and not design flaws. This jury and this Court

heard this evidence and rejected it. The dispositive fact remains that regardless of the steering inputs, as long as they are humanly possible of being done, the Ford Bronco II should have slid out and not rolled over.

This Court will not retry the *Ammerman* case, nor the findings of Kaplan and Hooker based upon the tests of a different vehicle done subsequent to this trial. Therefore, the Defendant's original T.R. 60(B)(8) motion is DENIED.

DEFENDANT'S SUPPLEMENT TO 60(b)(8) MOTION

The Defendant has also supplemented its original T.R. 60(B)(8) motion by requesting supplemental discovery on Hooker tests conducted April 2, 1996 of a "modified" Bronco II 4x2. This poses a problem almost identical to the Cherokee testing already discussed. The 4x2 vehicle is so dissimilar to the 4x4 that this Court granted Ford's Motion in Limine to prevent any discussion of 4x2's in this case. Testing on a modified 4x2 is not material to the issues before the Court as previously ordered by this Court in its order in limine. Furthermore, this Court is not persuaded that the modified Bronco II tests would have had any affect upon the result of this case. The fact remains that Ford's own engineers were recommending relatively minor changes in the 4x4 vehicle to make it more stable and no significant changes were made.

The Defendant's motion to reopen discovery and to file evidence of the *Ritter v. Ford* tests is DENIED and the Defendant's second 60(B) motion is denied.

DEFENDANT'S MOTION TO CORRECT ERRORS

A. STANDARD OF REVIEW

Ford's 50(A)(4) motion for judgment on the evidence on the punitive claim must be reviewed strictly because of the *Halsip*-type review seemingly required by the U.S. Constitution's due process clause. Therefore, this Court adopts a more stringent standard of review on the 50(A)(4) motion in this cause in order to avoid the duplicity of

conducting a traditional "complete failure of proof" review, *Lazarus v. Sutherline*, 1989, Ind. App. 544 N.E. 2d 513, which would later be rendered meaningless by the *Halsip* review. This Court will review the evidence completely independent from the jury's verdict to determine whether a reasonable jury could find that the elements of punitive damages were shown by "clear and convincing evidence."

As if in anticipation of John Grisham's new novel, the U.S. Supreme Court mandated a reigning in of unfettered jury discretion in handing out punitive damages in the recent case of *Pacific Mutual Life Ins. Co. v. Halsip*, 499 U.S.1, 113 L.Ed 2d1, 111 S.Ct. 1032 (1991). To pass procedural due process muster, the court implied that the jury must have been properly restrained by proper instruction as to the law. Next the punitive award must be based upon some reasonable objective criteria. Finally, the award must be subject to court review regarding the reasonable relationship between the punitive damages awarded and the Defendant's conduct.

B. *HASLIP* REVIEW OF THE PUNITIVE AWARD

This review of the procedures and evidence is intended to determine if punitive damages are justified in the first instance and, if so, whether they are excessive.

It should first be noted that Defendant has nowhere in its Motion to Correct Errors challenged the sufficiency nor efficacy of the final instructions. The Court's own review of its instructions on the punitive claim reveal more than adequate explanations of the clear and convincing burden of proof, of the types of conduct required and of the definitions of each term in question. The *Ammerman* jury was reasonably constrained by proper instructions from the Court.

It is clear to the Court that this jury followed the Plaintiffs' counsel's request for punitive damages to the letter. A Ford internal Program Report in 1981 projected the cost of enhanced stability at $83/unit. The jury multiplied

the figure times the total number of Bronco II sales of 700,000 for a total avoided expenditure of $58,100,000. The jury awarded $58,000,000 in punitive damages to deny Ford any profit from these vehicles. The verdict was based upon rational, objective criteria reasonably calculated to punish Ford for its wrongful actions.

The Court in its Statement of Fact set out facts upon which it relies. Taken as a whole, these facts support this jury's award of punitive damages. Specifically, this Court finds that the following facts and reasonable inferences there from were proven by clear and convincing evidence:

1. Before, during and after production, Ford Motor Company had knowledge that the Bronco II had a dangerous propensity to roll over.

2. Internal Ford memoranda show recommendations from design engineers to change the prototype to enhance stability. No changes were made.

3. During the development and design phase, the competition had sport utility vehicles in production. Every proposed design change was framed not only by cost considerations, but also by how it would effect Job #.

4. During initial development, Ford knew its "image vehicle," the Jeep CJ-7, was experiencing substantial post-production stability problems.

5. Arizona Proving Ground tests early in 1982 produced tip-ups and "critical handling problems." Indeed, the testing was suspended because it was too dangerous for the test drivers.

6. Ford engineers recommended widening the track as an effective means of increasing stability. Decision makers did not heed the call.

7. Ford's unprecedented preproduction document gathering and "sanitization" inferred it was getting ready to defend against anticipated litigation which it had every reason to expect. At best, the sanitization

was an attempt to soften the impact of the internal documents upon a third party reader. At worst, in the case of the missing documents, specifically Attachment II to Plaintiffs' Exhibit 174, an outright fraud was being perpetrated.

8. Ford did not make full disclosure of its prototype testing to the National Highway Traffic Safety Administration when information was requested of them in September, 1988.

9. Regardless of the static stability index, the driver's steering input, or any experts' opinions, the Watson Bronco II on August 2, 1991 did not meet Ford's own design goals, i.e., that it should have slid out on dry, flat pavement, rather than roll over.

10. The Bronco II's which rolled off the assembly line are dangerous and defective. Ford's knowledge of the defect cannot be reasonably questioned. The continued push to production of this product after all of the internal protestation to the contrary is the crassest form of corporate indifference to the safety of the ultimate user of consumer and constitutes gross negligence.

The U.S. Supreme Court looked favorably upon the factors considered by the Alabama trial courts in their procedural review of punitive damage awards. *Halsip, supra.* The trial court in *Halsip* first considered the culpability of the Defendants' conduct. As set out above, this Court finds Ford to be highly culpable in this case. Ford was aware of the dangers, attempted to conceal legitimate concerns and manufactured 700,000 of these vehicles over a seven year time span. Ford has never recalled these vehicles, nor has it ever publicly admitted the dangers which exist.

Next, the *Halsip* trial court reviewed the desirability of deterring others from the same or similar conduct. The motor vehicle is by its very nature a dangerous instrumentality. When offered to the public in a defective and unreasonably dangerous condition, Indiana's product liability steps in to protect our consumers. When the vehicle

is marketed in Indiana with reckless disregard for anything but market share and the bottom line, Indiana's common law allows the deterrent of punitive damages. It is essential to Indiana consumers to deter other vehicle manufacturers from repeating the tragic actions of Ford.

The *Haslip* court then reviewed the impact upon the parties and the potential for impact upon innocent third parties. The impact of the wrong in this case upon the Ammermans is obvious and devastating. No court of appeal, no matter how high, will ever truly experience the ripping emotion of Mr. Clarkson's direct examination of Pamela Ammerman from a written page. Suffice it to say, Mr. Clarkson's courtroom brilliance in examining a childlike witness will never allow this to be merely a case of design theory or fodder for tort reform. Pamela received $4,000,000 in compensatory damages and Lana $400,000. There is no significant challenge to these figures.

This Court comes to but one unequivocal conclusion, punitive damages were proper and appropriate in this case.

C. EXCESSIVENESS/REMITTITUR

The Court having found sufficient evidence existed for a punitive damage award by the jury, and that the assessment of punitive damages against Ford for its conduct is proper, must now turn to the issue of the amount of damages which are proper.

The punitive damages awarded must bear some reasonable relationship to the damages sustained, but courts have balked at applying any rigid proportionality test. *Hibschman Pontiac, Inc., v. Batchelor*, (1977) 266 Ind. 310, 362 N.E.2d 845. The recent U.S. Supreme Court case of *BMW v. Gore, supra*, reaffirms Indiana's common law of reviewing a claim of excessive punitive damages by considering the nature of the tort, *vis a vis*, the actual damages incurred. The tort in *Ammerman* is the placing of a potentially lethal product in the stream of commerce with a heedless disregard for public safety. Relating this tort and the corporation's apparent state of mind to the mangled

bodies, permanent disfigurement and brain injury sustained by the Plaintiffs in this case justifies a substantial punitive damage award.

Ford's net worth is about $219 billion and its gross income in 1994 was, roughly, $50 million per hour. The punitive damages awarded represent only 1% of Ford's 1994 profits. This Court cannot say that within the context of Ford's enormous wealth its profit of $2.2 billion from the sale of Bronco II, and the damages sustained that "at first blush" or otherwise, these damages are excessive. The Defendant warns of the evils of multiple prosecutions for their same conduct and differing results. The Court shares those concerns, and at this point in its review of the punitive award, the Court would have considered the existence of other civil awards or criminal sanctions against the Defendant for the same conduct as mitigation of the damage award. The Defendant chose to tell of its victories and not of any financial exposure it has incurred for the production of the Bronco II. There will be no reduction in the punitive award on this basis.

D. COMMERCE CLAUSE, STATE SOVEREIGNTY AND COMITY

A state's power to impose burdens upon the interstate market place are subordinate to the federal power over commerce. *Gibbons v. Ogden*, 9 Wheat. 1 194-196 (1824); *accord, Indiana Wine & Liquor v. State ex Rel., IABC*, Ind. App. 662 N.E.2d 950 (1996). The reason for the U.S. Constitution's commerce clause is to have a vibrant and diverse economy unfettered by state-imposed limitation.

The U.S. Constitution also requires deference be given to sister states to make their own policy regarding commerce within its borders. *Edgar v. Mite Corp.*, 457 U.S. 624, 643 (1982). The recent *Gore* case, *supra*, stated:

> "We think it follows from these principles of state sovereignty and comity that a state may not impose economic sanctions on violations of its laws with

> the intent of changing the tortfeasor's lawful conduct in other states." [at p.11]

So Indiana juries are prohibited from reaching across state lines to exact punishment upon conduct in other states. The *Ammerman* jury must focus upon conduct that occurred solely within Indiana and can only protect Indiana's consumer interests.

By awarding $83 per unit for 700,000 worldwide sales of Bronco II as punitive damages, the jury has unwittingly offended the U.S. Constitution. Facing a similar circumstance in *Gore, supra*, the U.S. Supreme Court approved the Alabama Supreme Court's grant of remittitur.

Further analysis of the *Ammerman* punitive award is necessary. The $83 per unit figure came from two estimated costs, i.e., retooling and per unit cost of additional parts. The retooling costs were estimated at $13,800,000 to change the manufacturing process. This was a one-time cost. The costs of the additional hardware installed on each vehicle was $54. Therefore, the Watson vehicle could have been made safer by Ford Motor Company's expenditure of $13,800,054.

An award of $13,800,054 deals only with the Ammermans and perhaps a new trial should be granted to allow the Plaintiffs to present evidence of statewide sales. However, this Court is vested with broad discretion and the entire judicial system must seek finality to its judgments and deliberate speed to its justice. The Court finds that an award of $13,800,054 is parochial enough to satisfy the commerce provisions of the U.S. Constitution, is not grossly excessive, and is substantial enough to have the desired deterrent effect upon Ford Motor Company. Furthermore, this figure approximates the treble damages allowed our civil code for offenses against property which is another consideration under *Haslip, supra*. I.C 34-4-30-1. Therefore, this Court grants Defendant's request for remittitur pursuant to T.R. 59(J)(5) and the judgment of this Court hereby reduced as follows:

JUDGMENT

Judgment is rendered for Plaintiff Lana Ammerman and against Ford Motor Company in the amount of $7,300,027.

Judgment is rendered for Plaintiff Pamela Ammerman and against Ford Motor Company in the amount of $10,900,027.

This judgment shall supersede and relate back to the former judgment of this Court rendered on November 1, 1995.

The costs of the action are assessed against the Defendant.

It is SO ORDERED this _ day of _____, 1996.

David L. Rimstidt, Judge
Marion Superior Court 5
Civil Division

(2)

Supreme Court, U.S.
FILED
FEB 18 2000
CLERK

No. 99-1221

In The

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

VICKI AMMERMAN, Guardian of PAMELA AMMERMAN, and LANA AMMERMAN,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Indiana

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether a punitive damages verdict rendered in a devastating personal injury case involving the "crassest form of corporate indifference to the safety of the . . . consumer" is excessive under *BMW of North America v. Gore*, 517 US 559 (1996), when the award was previously evaluated by the trial court and Indiana Court of Appeals utilizing *BMW's* three guideposts, and the remitted award was assessed not upon the defendant's economic wealth or extraterritorial conduct, but by calculating the costs necessary to correctly produce this vehicle, which amount was consistent with statutes which treble the compensatory damage award.

(2) Whether a defendant whose reprehensible behavior causes significant personal injury, resulting in a multi-million dollar compensatory damage award, had sufficient notice under *BMW's* "comparable penalty" guidepost that its conduct could result in a significant punitive damage award, when Indiana common law had long affirmed punitive damages for this type of conduct, in ratios larger than here, the legislature enacted statutory penalties twice the defendant's economic gain, which was well in excess of the punitive damages awarded here, and the award approximates treble damages authorized by statute.

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

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STATEMENT OF THE CASE

A. Nature Of Case And State Court Proceedings

This products liability case concerns the dangerous design of Ford Motor Company's ("Ford") Bronco II small sport utility vehicle ("SUV"), and the devastating injuries suffered from Ford's reckless disregard for the likely injuries it would cause. Contrary to Ford's argumentative statement of the case, the promise of *BMW of North America v. Gore*, 517 U.S. 559 (1996), has been faithfully fulfilled by Indiana's courts. For its reprehensible behavior of knowingly marketing a dangerously defective vehicle which caused severe injuries, Ford was assessed punitive damages of only slightly more than three times compensatory damages. *BMW's* guideposts, including the third one, have been met. Certiorari should be denied, as wealth forms no part of the remitted punitive award.

Ford has provided this Court with a Statement of the Case that bears little resemblance to the case tried to the jury, to the trial court's post-verdict punitive damages review, or to the Indiana Court of Appeals' unanimous decision. Ford asks this Court to review this case under *BMW*, but fails to provide this Court with a statement of the facts applicable to a *BMW* punitive damages analysis. *See* Sup. Ct. R. 14.1(g). The evidence relevant to *BMW's* guideposts are found in the decisions of the trial court and the Indiana Court of Appeals reproduced in Ford's appendix. Petitioner's Appendix, 48a-64a; 1a-44a.[1] The Ammermans provide the following summary in lieu of Ford's misleading statement.

The Bronco II had a dangerous product defect, namely, it would rollover on dry, flat pavement when the driver attempted an accident avoidance maneuver. The defect violated Ford's own design standards. App. 7a-9a.

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[1] References to Petitioner's Appendix are cited herein as "App. ___". References to the Record of Proceedings are cited herein as "R. ___".

The Ammermans presented clear and convincing evidence that Ford knew its design was likely to cause serious bodily injury due to its high center of gravity and lack of dynamic stability. App. 3a-11a, App. 25a-30a.

Ford did not move to bifurcate the trial on compensatory and punitive damages as permitted by Indiana Trial Rule 42(C). Rather, Ford filed a motion in limine requesting that evidence of wealth not be admitted until evidence supporting punitive damages had been admitted. R. 1071-77. At the close of their case, after introduction of evidence supporting punitive damages, the Ammermans submitted evidence of Ford's wealth. R. 9421-29. Ford objected to the proffer, not on constitutional grounds but instead alleging there was insufficient evidence to submit punitive damages to the jury. R. 9421-22, 9456-61. Neither the punitive damages instruction nor any instruction mentioned Ford's wealth. R. 11590-11616. The jury returned a compensatory verdict for Pamela Ammerman of $4 million and Lana Ammerman of $400,000. A verdict of $58 million in punitive damages was also awarded.

Post-verdict review of the punitive award was conducted under *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) and *BMW*. App. 58a-63a. The trial court specifically found that Ford knowingly and recklessly marketed a dangerously defective vehicle; that Ford failed to heed the call of its engineers to make the Bronco II safer; that Ford failed to disclose to the National Highway Traffic Safety Administration ("NHTSA") test results and data which showed the Bronco II's rollover defect; that Ford's failure to produce engineering documents was the perpetration of "an outright fraud"; and that Ford failed to meet its own design standards that the Bronco II "should have slid out on dry, flat pavement rather than rollover." App. 60a. The court held that Ford's knowledge of the defect could not reasonably be questioned, and that Ford's conduct was "the crassest form of corporate indifference to the safety of the ultimate user or consumer and constitutes gross negligence." App. 60a.

The court held the $58 million punitive verdict did not violate state excessiveness challenges. App. 61a-62a. Within this analysis the trial court mentioned Ford's wealth and stated that the $58 million verdict represented only 1% of Ford's net annual profits. App. 62a. Nevertheless, based upon its interpretation of *BMW's* statements regarding extraterritorial reach, the punitive award was remitted to $13.8 million. App. 62a-63a. The remitted award was based not on Ford's wealth or net annual profits, but upon its fixed retooling costs that were necessary to make the Bronco II safe. The trial court also found the remitted punitive award closely approximated treble damages, and was consistent with Indiana Code 34-4-30-1[2] which allowed such awards for offenses against property. App. 63a.

The Court of Appeals' decision agreed that Ford's conduct was the crassest form of corporate indifference, and affirmed the remitted award of punitive damages as well within the parameters of this Court's pronouncements in *BMW*. App. 34a-44a.

B. Factual Background

Ford's decision to ignore its engineers' design recommendations, to distribute the Bronco II despite its known defects, and its attempts to cover up the known dangers is accurately stated in the Court of Appeals' decision. App. 1a-12a. Briefly, Ford's design standards for the Bronco II required that it be extremely safe and that it not rollover in emergency avoidance maneuvers. R. 5960-62, 5919, 5938. The vast majority of vehicles will not rollover or tip up in emergency avoidance maneuvers. R. 7060-70. Ford knew the Bronco II had an extremely high center of gravity and a dangerous twin I-beam suspension. R. 8859-61, 7970-72, 8886-90. Recommendations to employ a safer suspension like the Chevrolet S-10 Blazer ("Blazer") were ignored. Ford rushed development of the Bronco II

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[2] Recodified as Ind. Code 34-24-3-1.

because it was well behind the Blazer. R. 7943-50, 8880, 6016, 6041.

Because of the rush to get the Bronco II to market, Ford maintained a production protocol modeled after the Jeep CJ-7 ("CJ-7"), knowing it had rollover propensities three times higher than other vehicles in its class. R. 6000-04, 7696-98, 7703, 5995, 7188, 11243. Live tests of the Bronco II resulted in numerous rollovers. Recommendations by Ford engineers to widen the track three to four inches and lower its ride height were ignored. App. 6a-7a; R. 7222, 7230, 7228-30, 7268, 7286, 6770-71, 7236. Further testing resulted in repeated tip-ups, outriggers failing, and vehicles pole-vaulting over. App. 6a-7a; R. 8809-11, 7272-74, 7214-15. Ford's engineer admitted that live testing of the Bronco II was discontinued because it was "too dangerous" for its test drivers and engineers. App. 7a; R. 8809-11.

Rather than address the problem, Ford, with the aid of its lawyers in the Office of General Counsel, collected all engineering reports bearing on Bronco II development. App. 7a-8a. Known as "Program Documentation Methodology" or sanitization, 113 documents relating to Bronco II handling were collected. App. 7a-8a; R. 1542, 6834, 6836, 6964, 8345, 10592. Fifty-three documents disappeared despite collection of numerous copies. App. 7a-8a. One document ("attachment two") describing seven major risk factors due to incomplete testing was issued just two months before production. R. 7333-35, 7337. "Attachment two" was never produced. The tests were never conducted. R. 8819-21.

As sign-off for production occurred, Ford reported an increase to the Bronco II's stability index ("SI"). Ford admitted this was due to a paper change, not an engineering change. App. 7a; R. 6045-48, 6965-68, 6074-75, 8821-22. The Bronco II Ford placed on the market had neither the wider track width nor lower center of gravity recommended by Ford engineers. R. 8879-80. In 1984, a Michelin report commissioned by Ford found no increase in the SI, contrary to Ford's report. R. 6971-74, 9278-80.

When asked by NHTSA, Ford refused to turn over its devastating test results and other rollover information including its own statistical metric which predicted the Bronco II as nearly the worst performer in rollover resistance.[3] App. 9a-10a; R. 10146, 10149, 10150, 8428-30, 8438, 8445-52. NHTSA also determined the Bronco II the overall worst. R. 8439-40, 7646-51. Ford admitted (and others concluded) that the Bronco II had rollover rates three times that of the Blazer, and higher than the CJ-7.[4] R. 8184-86, 8547-53, 10867. Moreover, in attempting to kill "a totally disastrous story" about to be published in Consumer Reports, Ford employees reported to executives that they had successfully "clouded their [Consumer Union's] minds, loosened some conclusions, . . . and sent them off to search for additional information that could work to our advantage." App. 10a-11a; R. 9264-65. Ford's guilty knowledge was confirmed when it finally conducted live tests again in 1989. R. 7339. The Bronco II

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[3] Ford suggests that its failure to produce test results to NHTSA is excusable and that this Court can take judicial notice that NHTSA has not recalled the Bronco II or adopted a stability standard. Pet. 5. At trial Ford stipulated that the issue of whether it wrongfully withheld test information from NHTSA was for the jury. R. 8486. Ford's arguments were soundly rejected by the Indiana Court of Appeals. App. 25a-30a; *see also Gamblin v. Ford Motor Company*, 513 S.E.2d 467 (W.Va. 1998). Moreover, federal law contains a savings clause for state actions. 49 U.S.C. § 30103(e). NHTSA's failure to adopt a stability standard or recall a single SUV is likely due to its "limited resources." 64 Fed. Reg. 27343.

[4] Ford mischaracterizes the Ammermans' theory that the Bronco II was defective because it had a low "static stability index." Static stability was only part of the Ammermans' theory. App. 26a. The Bronco II failed everyone's "dynamic" tests, including Ford's. App. 21a; R. 6790, 7040, 7076, 6790. Ford's documents constantly refer to "SI." Ford conceded, and actual rollover data confirmed, that "SI" is predictive of rollover. R. 10632, 5989, 6000.

instantly rolled up on two wheels and nearly barrel rolled at 37 m.p.h. Plaintiff's Ex. 425.[5]

Ford's attempt to create a different accident must be rejected. Eyewitnesses placed Watkin's initial speed in the 40 m.p.h. range, and never more than 55 m.p.h. R. 5770, 7840, 7852. Ford's attempt to boost the speed to 65 m.p.h. misrepresents the Court of Appeals' opinion which contains no such reference. Pet. 3; App. 11a-12a. Watkins decided to pass two slow moving vehicles, a pickup truck and a Blazer. As he was alongside the truck, it began to pull out and pass. He was forced to put the Bronco II's left wheels onto the shoulder. R. 7843-46, 7846. He accelerated to get past the pickup and turned the steering wheel to the right to bring the vehicle back on the road, but the Bronco II headed for the Blazer. R. 7846-47. The Bronco made "very light contact" leaving some small dents. R. 7510, 5775. Watkins turned back to the left. Believing he was headed toward a guardrail, he turned to the right, whereupon the Bronco II barrel rolled three times down the pavement. R. 5848, 5782. Ford's reconstruction expert conceded this rollover was untripped and occurred on dry, flat pavement; and that the transition from the shoulder back onto the pavement, as well as the impact between the Bronco II and the Blazer, had nothing to do with the rollover. R. 9787, 9772-73. The rollover occurred as a result of a classic avoidance maneuver. R. 7056.

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[5] Ford's continued claim that the Ammermans' emergency avoidance testing was different from others was fully addressed by the Court of Appeals. App. 13a-23a. The Ammermans' experts used course protocol similar to those of other testers. App. 13a-14a. None of the avoidance maneuvers have steering protocol. R. 7104. Ford's design standards for the Bronco II clearly indicate that steering protocol and speed should not have a bearing on stability. R. 5938, 5960, 7134. Ford's issue under Indiana Rule of Evidence 702 was properly rejected because the tests used in the industry only differ "somewhat from one another." App. 13a-23a; R. 7074-79.

Pam and Lana were thrown from the vehicle. Pam suffered severe physical injuries including a skull fracture, swelling of the brain, a crushed pelvis, and a fractured clavicle. Pam has permanent brain damage. She has the mental capacity of a child and suffers from a bi-polar condition. App. 11a-12a; R. 5677, 6855, 6923, 8614. Lana also suffered severe physical injuries to her face, head, neck, right clavicle, left leg, and left lung. R. 8858-68, 8590, 6645-46. Ford does not challenge the compensatory damage awards for these injuries.

REASONS FOR DENYING THE WRIT

Less than four years after this Court decided *BMW*, Ford asks this Court to revisit it to "resolve the conflicts and confusion that have arisen since *BMW* . . . and to ensure that the . . . guideposts continue to have meaningful effect." Pet. 9. Ford contends additional action is necessary because there has been an outbreak of record-setting awards against the country's largest automobile manufacturers, and because lower courts continue to uphold excessive awards on grounds inconsistent with *BMW*. Pet. 8-9. In particular, Ford contends that lower courts evade *BMW's* guideposts by relying on a factor rejected by *BMW* – the defendant's worldwide wealth and profits – to uphold huge punitive awards. *Id.*

This issue is not raised in this case. Ford's wealth was not the basis for the jury's original award of punitive damages, the trial court's remitted punitive damages award, or the Court of Appeals' affirmation of that award. Rather, Ford's reprehensible behavior, and the need to deter its conduct, formed the basis for the award.

Even if this issue were presented, it is not worthy of review. Ford erroneously suggests that lower courts are forbidden to apply their own common law tests in addition to *BMW's* guideposts. Ford also presumes *BMW's* guideposts are preclusive, eradicating over two hundred years of common law which evaluates various factors,

including a defendant's wealth, in determining whether a punitive damage award is excessive under state law. There is no conflict in the cases on these points. Moreover, the remitted punitive award was less than the Indiana profit Ford gained from selling the Bronco II, and Ford fails to show, or even argue, that the remitted award is excessive under *BMW's* guideposts because of the alleged injection of wealth into the constitutional calculus.

Ford has already received all due process, procedural and substantive, that it was entitled to because Ford has already received the benefit of remittitur under *BMW*. After hearing weeks of testimony and viewing hundreds of Ford's internal documents, the jury assessed $58 million in punitive damages. The trial court engaged in a searching review of the record post-verdict and considered a panoply of Ford's arguments, including excessiveness and due process. That court held that the award was not excessive under Indiana common law because "taken as a whole, the [. . .] facts support the jury's award of punitive damages, and . . . [t]he verdict was based upon rational, objective criteria reasonably calculated to punish Ford for its wrongful actions." App. 62a. The trial court held that Ford's "continued push to production of this product after all of the internal protestation to the contrary is the crassest form of corporate indifference to the safety of the ultimate user or consumer and constitutes gross negligence." App. 59a-60a. After concluding it was essential to Indiana consumers to deter other vehicle manufacturers from repeating Ford's tragic actions, the trial court nevertheless remitted the award under *BMW*, concluding the jury unwittingly offended the Constitution by assessing punitive damages upon all 700,000 Bronco II's sold worldwide. Because the Watson vehicle could have been made safer had Ford expended $13,800,054, the court remitted the verdict to that amount concluding that it was parochial enough to satisfy the Commerce Clause, was not grossly excessive, and was substantial enough to have the desired deterrent effect on

Ford. Moreover, the court noted the figure approximated treble damages under Indiana's civil code for offenses against property. App. 63a.

The jury's verdict of $58 million was sound, both under Indiana common law, and *BMW's* three guideposts. Nevertheless, the trial court reduced the award by over 75% in order to remove any extraterritorial reach caused by the jury's consideration of the cost to correct out-of-state vehicles. Ford's suggestion that the remitted award, which was cleansed of any extraterritorial reach and was calculated upon state law grounds, violates due process under *BMW* because its wealth was a factor, completely lacks merit.

A. Punitive Damages Were Imposed To Deter Ford's Reprehensible Conduct, Not Based On Wealth

1. The Original And Remitted Punitive Verdicts Were Assessed On State Law Grounds

Ford's wealth is not, and never has been, a component of the calculus for punitive damages. Instead, the jury, trial court, and Court of Appeals were primarily, if not exclusively, concerned with deterring Ford's reprehensible behavior. Nothing in the trial or the post-judgment reviews suggests that Ford's wealth was a factor in the punitive damages equation. Because the remitted punitive awards were calculated on unchallenged state law grounds, this case does not present any federal due process issue. Ford's argument presumes that because the jury and judiciary were aware of its wealth, it must have affected the judgment. However, this Court has already held if "fair procedures were followed a judgment that is a product of that process is entitled to a strong presumption of validity" and Ford has never challenged the process itself. *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 457 (1993). Ford can never carry its burden of proving that the remitted award was unconstitutional.

Ford's wealth was not a significant factor for the jury. Evidence of Ford's wealth was not introduced until the close of the plaintiffs' case, without extended discussion or argument. R. 9421-29. During the Ammermans' closing argument, counsel did not focus on Ford's economic wealth, but instead focused on Ford's gain from the Bronco II, contending the jury could (1) triple the compensatory damage awards; (2) multiply the $83 per unit cost, or the 2.5% of additional profit that Ford realized, by the 468,000 units that Ford anticipated selling; or (3) multiply the $83 per unit times the 700,000 vehicles Ford actually sold. R. 11455-56. Although the trial court remitted the award to remove any profit from sales outside Indiana, this case does not present the same concerns as *TXO*, where the defendant's wealth and out-of-state status were repeatedly referenced by counsel throughout the trial. *TXO*, 509 U.S. at 485-493 (O'Connor, J., dissenting).

No jury instruction was given referencing Ford's wealth. Instead, the jury was appropriately instructed that once the predicate conduct had been established, punitive damages "may be awarded in such sum as you believe will serve to punish the defendant and will deter the defendant and others from like conduct in the future". R. 11608-09. Ford tendered a similar instruction. R. 1789-90. The jurors were obligated to follow this instruction in reaching their verdict. *Griffin v. Acker*, 659 N.E.2d 659 (Ind.Ct.App. 1995), *trans. denied*.

Likewise, the trial court's analysis, and its remittitur calculation, did not focus on Ford's wealth, but rather on the need to deter Ford's reprehensible behavior. In response to Ford's post-verdict request for remittitur, the court entered an extensive order which summarized the salient facts. App. 49a-54a. The court found "[t]aken as a whole, these facts support this jury's award of punitive damages" and they established, by clear and convincing evidence, that "before, during and after production, [Ford] had knowledge that the Bronco II had a dangerous propensity to rollover"; that testing was suspended because it was too dangerous for the test drivers; that

Ford's pre-production document gathering and sanitization was at best an attempt to soften the impact of its internal documents, and at worst, was the perpetration of an outright fraud; and that Ford's "continued push to production of this product after all of the internal protestation to the contrary is the crassest form of corporate indifference to the safety of the ultimate user or consumer." App. 59a-60a. The court concluded it was "essential to Indiana consumers to deter other vehicle manufacturers from repeating [Ford's] tragic actions." App. 61a.

In deciding the amount of damages to assess, the court turned to *BMW*, and in accordance with its guidelines, first considered the nature of the tort, concluding that the tort was "the placing of a potentially lethal product in the stream of commerce with a heedless disregard for public safety." App. 61a. The court held that "relating this tort and the corporation's apparent state of mind to the mangled bodies, permanent disfigurement and brain injury sustained by the Plaintiffs . . . justifies a substantial punitive damage award." *Id.* It evaluated the original jury award in light of Ford's net worth and profits, holding the jury's verdict of $58 million was not excessive under state common law. *Id.*

In remitting the judgment to eliminate any extraterritorial reach, the court did not rely, or even refer to, Ford's wealth. It instead created its own state-based formula. The court noted that the one-time retooling cost to change the manufacturing process was estimated at $13,800,000, and the cost of additional hardware on each vehicle was $54. The court held the Watson vehicle could have been made safer by Ford's expenditure of $13,800,054, and entered judgment for that amount. App. 63a. This calculation was not based on Ford's nationwide profits, wealth, or net worth, but on Ford's costs to remove the defect from the Watkins vehicle. Ford cannot demonstrate that this approach to punitive damages violates its due process rights.

Moreover, the trial court relied on Indiana grounds as further support for its recalculation of punitive damages. It concluded the remitted judgment was substantial enough to have the desired deterrent effect upon Ford, and it approximated Indiana's statutory penalty of treble damages for offenses against property. App. 63a. The trial court's analysis and the judgment it rendered are appropriately state-based in form and intent, and in no way implicates Ford's nationwide wealth or profits. Accordingly, Ford cannot maintain a federal due process claim.

Likewise, Ford cannot complain that its wealth or profits influenced the Court of Appeals' analysis. The Court of Appeals' opinion addresses Ford's due process argument utilizing, as it should, *BMW's* three guidelines. App. 39a. After addressing each of the three guideposts, the Court unanimously concluded that the remitted award of punitive damages was appropriate under *BMW*. The opinion in no way relied upon Ford's wealth or profits from other jurisdictions to avoid *BMW's* three prongs. Accordingly, Ford's Petition should be denied.

2. Because The Punitive Award Was Less Than Ford's Indiana Profits, It Could Never Be Excessive

Assuming, *arguendo*, that the remitted punitive award was somehow tainted with Ford's wealth and extraterritorial profits, despite the state-based calculus used by the trial court, Ford still cannot demonstrate prejudice. The remitted award was much less than the Indiana profits Ford reaped from its sale of the Bronco II, and thus the award cannot be considered excessive.

Ford admittedly sold 11,452 Bronco II's in Indiana, with a $3,570 profit per vehicle. R. 126, 7195. Thus, Ford reaped an Indiana-based profit of $40,883,640 from this product, well in excess of the remitted award of $13.8 million. Three members of this Court have already recognized that the removal of the defendant's profit from the illegal activity is a factor that has the ability to limit

awards to a fixed, rational amount. *BMW*, 517 U.S. at 591 (Breyer, J., dissenting). A punitive damage verdict which is no more than the defendant's profit from the illegal activity is appropriate, because the punitive award should eliminate the prospect of gain by the offender. *See, Cummings Medical Corp. v. Occupational Medical Corp. of America, Inc.*, 13 Cal.Rptr. 2d 585, 589 (Cal.Ct.App. 1992), *rev. denied*, and cases cited therein. Although a gain-based measure of punitive damages may sometimes not be enough to deter future misconduct, it is never too much. *BMW*, 517 U.S. at 589-590.

Ford could have been sanctioned for the entire amount of its Indiana gain, because all Bronco II's sold in Indiana were sold with the same dangerous defect. Ford never recalled nor modified the vehicle. App. 60a. A sanction which is only thirty-five percent of Ford's ill-gotten Indiana profits is not excessive, or more than is necessary for deterrence.

3. Ford's Wealth-Based Excessiveness Arguments Were Waived During The State Court Proceedings

It is axiomatic that constitutional issues must first be properly raised in state court, so the state court has the opportunity to decide the question. *TXO*, 509 U.S. at 464. Ford failed to preserve its economic wealth issue in the trial court, and failed to present the question to the Indiana Supreme Court. Ford conceded during trial that its net worth and economic wealth was evidence appropriate for jury consideration on the punitive damages claim. Ford never requested bifurcation of the punitive claim or tendered any instruction to limit the jury's consideration of the evidence. Moreover, Ford did not object to any punitive damages instruction given to the jury. The jury was instructed that if it awarded compensatory damages, and by clear and convincing evidence found that Ford had acted willfully or wantonly, with conscious disregard for probable injury or gross negligence, it could

award punitive damages in such sum "as you believe will serve to punish the defendant and will deter the defendant and others from like conduct in the future". R. 11608-9.

Although Ford filed numerous motions in limine, it never requested exclusion of its economic wealth; it only requested it not be admitted until the plaintiffs had established their case in chief. R. 1071-77. Accordingly, the Ammermans only proffered evidence of Ford's economic wealth at the close of their case. R. 9421-29. When the evidence was admitted, Ford's sole objection was that wealth was irrelevant because there was insufficient evidence to submit punitive damages to the jury. R. 9421-22; 9456-61. Ford failed to object on any due process ground. Likewise, Ford failed to raise "wealth" as a due process issue before the Indiana Supreme Court, and accordingly, this Court may decline to entertain this question on certiorari. *TXO*, 509 U.S. at 464.

Ford's repeated failure to raise this argument during the state court proceedings is understandable, and consistent with the manner the case was adjudicated. Neither the jury nor the trial court assessed its punitive sanction based upon Ford's wealth, and the Court of Appeals affirmed the judgment on both state common law grounds and due process grounds unrelated to net worth. Ford's 11th hour attempt to convert this case into one which presents a question of punitive damages based on economic wealth must be rejected.

4. The Remitted Judgment Is Consistent With *BMW's* Three Guideposts

Even if Ford could demonstrate that its economic wealth was implicated in the calculation of punitive damages, the judgment is still appropriate. The trial court's remitted award was entirely consistent with *BMW's* guideposts, which is evident not only from the trial court's order, but from the Court of Appeals' opinion which affirmed the remitted award on that basis. Notably,

Ford fails to address how this verdict was "excessive" under *BMW*. It instead claims that other recent, and much larger, punitive awards from other jurisdictions are excessive when those judgments are based on unknown facts, and have not yet completed appellate review. Pet. 8-9. Whether other punitive verdicts are worthy of review remains to be seen; however, the fact they were rendered does not make the present judgment excessive.

Both the trial court and the Court of Appeals were cognizant of *BMW's* teachings, and followed them to the letter. Ford fails to address *BMW's* first two guideposts or show how they were not satisfied. Ford's plea for certiorari rests primarily upon its misperception that some courts hold a defendant's wealth sustains a grossly excessive punitive award under *BMW*, while other courts reject that notion. Pet. 15-16. In either case, excessiveness under *BMW* is the key. Neither camp suggests a punitive award which is **constitutional** under *BMW* is excessive **merely** because a defendant's economic wealth was admitted into evidence. Ford's failure to argue that the remitted judgment is excessive under *BMW's* guideposts makes the perceived dichotomy between these cases and this litigation an academic exercise.

Ford's failure to engage *BMW* is as understandable as it is outcome determinative. This case does not present the question of punitive damages for economic losses resulting from a "paint job". Rather, this case "involv[es] [a] grave physical injury imposed on a helpless citizen by a callous malefactor". *TXO*, 509 U.S. at 480 (O'Connor, J., dissenting). *BMW* provides compelling grounds to sustain the remitted judgment.

a. Degree of Reprehensibility

The degree of reprehensibility is the most important indication of the reasonableness of the punitive award. Exemplary damages should reflect "the enormity of [the] offense." *BMW*, 517 U.S. at 575. In *BMW*, none of the

aggravating factors associated with reprehensible conduct were present; the harm inflicted on the plaintiff was purely economic. Moreover, **BMW's conduct evidenced no indifference to, or reckless disregard for, the health and safety of others.** *Id.*

By comparison, the Indiana jury and trial court heard compelling evidence that Ford was indifferent to, and exhibited reckless disregard for, the health and safety of its consumers. This is not a case where only economic damages were at stake; rather, the lives and welfare of thousands of Bronco II purchasers and the motoring public were at issue. Ford knew of the Bronco II's "critical handling problems"; discontinued all on-track limits testing after repeated rollovers; sanitized and destroyed incriminating documents; concealed adverse rollover testing and its metric from NHTSA knowing it was predictive of rollover risk and rated the Bronco II the overall worst; and "clouded the minds" of the public regarding the Bronco II's rollover propensity. Ford's "crass corporate indifference" resulted in life-threatening, debilitating and permanent injuries to two young women who will never fully recover. Ford's conduct exemplifies the callous, wanton conduct that was absent in *BMW*. *Id.* at 579.

A recidivist may be punished more severely than a first offender because repeated misconduct is more reprehensible than an individual instance of malfeasance. *Id.* at 577. "[E]vidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required." *Id.* at 576-77. This Record is replete with Ford's knowing, yet **repeated**, engagement in prohibited conduct over the course of several years, both pre-production and post-production. Moreover, Ford's continued culpable behavior, in light of the multi-million dollar sanctions received for marketing other defectively dangerous vehicles, demonstrates recidivism. *See*, e.g., *Grimshaw v. Ford Motor Co.*, 174 Cal.Rptr. 348 (Cal.Ct.App. 1981) (Pinto). *BMW* makes a "promise", but not the one Ford suggests; its promise is

that strong medicine is still appropriate to cure disrespect for personal safety.

b. Ratio of Punitive Damages to Harm Inflicted

In *BMW* this Court refused to draw a mathematical bright line between the constitutionally acceptable and unacceptable, applying a "general concern of reasonableness." **In particular, a higher ratio of punitive damages may be appropriate where "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine."** *Id.* at 582 (emphasis added).

The jury awarded punitive damages of 13 times the total compensatory award. As the trial court found, this award does not rise to the 500:1 level which "raise[s] a suspicious judicial eyebrow." R. 5133. Nevertheless, when the award was remitted to $13.8 million, the ratio was reduced to a total of 3 to 1. This reduced ratio is not "breathtaking" in light of the reprehensibility of Ford's conduct. Moreover, the Ammermans' permanent physical and mental injuries are "non-economic harm[s] which [are] difficult to determine." *BMW*, 517 U.S. at 582. Ford's failure to address this prong of *BMW* is telling, and concedes the appropriateness of the remitted verdict.

c. Sanctions for Comparable Misconduct

BMW's third factor compares punitive damages to civil or criminal penalties that could be imposed for comparable misconduct. Because Ford has raised this guidepost as a separate ground for certiorari, it will be addressed in Section C, *infra*.

d. Post-*BMW* Decisions

The remitted judgment is consistent with the punitive damage judgments this Court considered in light of *BMW*, and then denied certiorari. For example, in *Oberg v.*

Honda Motor Co., 888 P.2d 8 (Or.Ct.App. 1995), *cert. denied*, this Court denied certiorari leaving intact a $5 million punitive damages verdict in a product liability case involving personal injury (and where net worth of the defendant was a factor in post-judgment review). In *Ford Motor Co. v. Fulkerson*, 812 S.W.2d 119 (Ky. 1991), a truck's defective wheel caused one death and one injury. This Court denied certiorari, leaving a total of $4 million in punitive damages intact. Although the denial of certiorari has no precedential value, none of the six cases subject to remand orders in light of *BMW* involved personal injury or death. *See, Ford Motor Co. v. Sperau*, 708 So.2d 111 (Ala. 1997); *Union Security Life Ins. Co. v. Crocker*, 709 So.2d 1118 (Ala. 1997), *cert. denied*; *American Pioneer Life Ins. Co. v. Williamson*, 704 So.2d 1361 (Ala. 1997); *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320 (11th Cir. 1999), *cert. denied*; *Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F.3d 634 (10th Cir. 1996), *cert. denied*; *Apache Corp. v. Moore*, 960 S.W.2d 746 (Tex.Ct.App. 1997), *review denied*; *see also, Axen v. American Home Products Corp.*, 974 P.2d 224 (Or.Ct.App. 1999), *cert. denied* ($20 million punitive award affirmed for manufacturer's knowledge of drug-induced blindness).

The remitted judgment is entirely consistent with *BMW's* guideposts, and with the exception of the last factor, Ford does not argue otherwise. Because Ford cannot demonstrate that this judgment violates *BMW's* due process boundaries, it cannot prove the judgment is excessive.

B. The State Courts' Continued Use Of Wealth As An Additional Common Law Factor To Measure Deterrence Does Not Present A Question Worthy Of Review

Even if this Court believed this case presents the issue Ford posits, and that resolution of the issue would change the punitive damages verdict, Ford's petition for

certiorari should be denied on the merits. Ford's contention that this Court intended, by issuing *BMW*, to eliminate the use of factors other than *BMW's* three guideposts in evaluating whether a punitive award is excessive, is erroneous. The lower courts are not in conflict on this question, and this issue is not important, substantial or recurring.

1. This Court Never Intended To Eradicate State Common Law Factors Used To Evaluate Excessiveness And The Need For Deterrence

Punitive damages have been recognized since at least 1763, and have been firmly ingrained in our nation's common law for at least 200 years. *Callaghan*, PUNITIVE DAMAGES LAW AND PRACTICE, §§ 1.01, 1.02; *see also*, *Haslip*, 499 U.S. at 14. Likewise, it is beyond dispute that under modern law the primary reason for imposing punitive damages is to deter recidivism and to deter others from engaging in the same culpable behavior. *Callaghan*, §§ 2.07, 2.09. This Court acknowledged that punitive damages might properly be imposed to further a state's legitimate interests in punishing unlawful conduct and deterring its repetition. *BMW*, 517 U.S. at 568; *Haslip*, 499 U.S. at 19. Given these precepts, it is the general rule in nearly all jurisdictions that evidence offered by the plaintiff about the defendant's financial status is admissible if other evidence supports the submission of a punitive damages claim to the jury. *Callaghan*, § 5.36; MODEL PUNITIVE DAMAGES ACT § 4(a) (1996). Evidence of the defendant's financial situation is important for the jury to determine the sum that will be adequate to punish the defendant and to deter similar conduct in the future. In other words, it may take more money to punish or deter a wealthy defendant than it would to punish one of only modest means. *Id.*, § 5.36.

BMW was decided against this backdrop of firmly established common law. This Court opted to review *BMW* because it "would help to illuminate 'the character

of the standard that will identify unconstitutionally excessive awards' of punitive damages." 517 U.S. at 568. This Court noted that "in our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case. Most states that authorize exemplary damages afford the jury similar latitude, requiring only that the damages awarded be reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence." *Id.* For this reason, the Court opined that the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve. *Id.* The Court's creation of three "guideposts" was designed to ensure that a defendant receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose. *Id.* The fact BMW was a large corporation rather than an impecunious individual did not diminish its entitlement to fair notice of the state's demands on the conduct of its business. *Id.* at 585.

The Ammermans do not suggest that Ford is not entitled to fair notice of Indiana's demands; rather, the Ammermans have conclusively demonstrated that Ford **had** fair notice of those demands, given its undisputed satisfaction of *BMW's* guideposts. However, *BMW* does not suggest that this Court intended to make its guideposts preclusive, or eliminate other factors, such as wealth, to gauge the state's interest in deterrence.

The majority's use of the term "guideposts" to designate the three prongs associated with fair notice is indicative of its intent that these factors are guides only. Likewise, the majority opinion notes the Alabama Supreme Court applied the state common law test for excessiveness, including the impact on the defendant's financial position, and that court's conclusion "the judgment would not have a substantial impact upon [BMW's] financial position." *BMW*, 517 U.S. at 566. Had this Court intended to preclude any state from considering the

defendant's financial position, presumably it would have commented on this point in its Opinion. This omission is noted in the dissenting opinion: "the Court nowhere says that these three 'guideposts' are the only guideposts; indeed it makes very clear that they are not – explaining away the earlier opinions that do not really follow these 'guideposts' on the basis of additional factors, thereby 'reiterat[ing] our rejection of a categorical approach' ". *Id.* at 606 (Scalia, J., dissenting). The concurring Opinion discusses Alabama's consideration of the financial position of the defendant, and concludes that "since a fixed dollar award will punish a poor person more than a wealthy one, one can understand the relevance of this factor to the State's interest in retribution (though not necessarily to its interest in deterrence, given the more distant relation between a defendant's wealth and its responses to economic incentives)." *Id.* at 591 (Breyer, J., concurring). After noting that this factor may inflate awards when the defendant is wealthy, the concurring Opinion concludes that "does not make its use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors, such as reprehensibility to constrain significantly an award that purports to punish a defendant's conduct." These words could have been written for the instant case: Ford's unchallenged satisfaction of *BMW's* guideposts forecloses any contention that its wealth resulted in an unconstitutionally inflamed punitive award.

Alabama's decision to give weight to several factors, including the defendant's financial position, were standards the Court had previously held "impos[ed] a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages." *BMW*, 519 U.S. at 610-611 (Ginsberg, J., dissenting), citing *Haslip*, 499 U.S. at 22, and *TXO*, 509 U.S. at 462. This Court noted that it had more than once approved the common law method for assessing punitive damages and after two hundred years of practice, it would need a strong case for the Fourteenth Amendment

to affect it. *Haslip*, 499 U.S. at 15, 17. The Court warned that the lower courts may embrace a number of factors, so long as the factfinder is guided by **more** than the defendant's net worth. *Id.* This language does not suggest that a passing reference to a defendant's wealth, in conjunction with a number of other factors, including *BMW's* guideposts, is constitutionally suspect. *See, Haslip*, 499 U.S. at 52 (O'Connor, J., dissenting) (suggesting that vagueness could be eliminated if the "Green Oil factors", including the financial position of the defendant, were given to the jury).

Likewise, *TXO* rejected the argument that the admission of evidence of wrongdoing in other parts of the country, and impressive net worth, led the jury to base its award on impermissible passion and prejudice. 509 U.S. at 462, n.28. This Court held that "under well-settled law, however, factors such as these are typically considered in assessing punitive damages" and had been approved in *Haslip*. *Id.* While the Court was concerned that the jury instruction which emphasized the wealth of the wrongdoers increased the risk the award may have been influenced by prejudice against large corporations, that issue is not implicated here, as this Indiana jury was not instructed to consider Ford's wealth, only the need to deter Ford's culpable behavior. *Id.* at 464; *see* R. 11609-10. Furthermore, as here, TXO's belated constitutional attack was not properly presented to the highest court of the state, and thus this Court refused to pass on it. *TXO*, 509 U.S. at 464.

The four dissenting justices in *TXO* conceded that consideration of a defendant's wealth was not unconstitutional, and wealth of the perpetrator was long thought to be relevant. *Id.* at 491-492. However, the dissenting justices were concerned with the over 500-1 ratio of punitive damages to compensatory damages; the fact

the jury instruction linked deterrence to TXO's wealth; the fact that counsel argued only one measure for punitive damages (TXO's wealth); and that counsel repeatedly reminded the jury that TXO was a wealthy, out-of-state corporation. *Id.* at 487-495. None of those concerns is present here, where the overall ratio of punitive to compensatory damages is 3:1, the jury was not instructed to consider Ford's wealth, and the Ammermans' counsel did not focus on Ford's wealth or non-resident status during the trial or in closing argument. There is no basis for Ford's assertion that the instant judgment violates due process merely because evidence of its economic wealth was admitted.

2. There Is No Irreconcilable Conflict In The Cases Interpreting *BMW*

To obtain certiorari, Ford must demonstrate a real or intolerable conflict in the law on an important question of federal law which is irreconcilable, and not subject to a permissible difference of opinion from various state courts. ROBERT L. STERN ET AL., SUPREME COURT PRACTICE §§ 4.3, 4.4. Ford suggests that numerous courts are using a defendant's wealth as a "trump" card to avoid remitting an otherwise excessive judgment under *BMW's* guideposts, or as a proxy for a "proper" analysis under *BMW*. Pet. 11-15. The Ammermans contend these cases do not support Ford's proposition. The great majority of cases, both state and federal, faithfully apply *BMW's* guideposts to determine whether a punitive judgment is excessive. Those cases also review a number of other common law factors, including economic wealth, in gauging a judgment's excessiveness. In making this comprehensive analysis, there is no intent to evade *BMW's* teachings; rather, the courts have simply not limited their analysis to *BMW's* factors alone. The great majority of courts that have addressed the question of excessiveness continue to apply both federal and state factors, and make a dual analysis under both state common law and federal due

process principles. Although the lower courts may differ in the emphasis they place on the defendant's financial status, that differential suggests only historical differences embodied in each state's common law, which is inherent in our federal system.

3. This Issue Is Not Important, Substantial Or Recurring

Ford makes several erroneous propositions: (1) it questions the court's "commitment to do equal justice to the rich and poor"; (2) the use of corporate wealth is irrational; (3) compensatory damages have significant deterrent effects; and (4) reliance on a corporation's worldwide wealth flouts *BMW's* ban on extraterritorial punishment. Pet. 16-21. Notably, Ford fails to recognize there can be no "inflamed" punitive award based upon corporate wealth in Indiana, given Ind. Code 34-51-3-5 which limits punitive damages to the greater of three times compensatory damages or $50,000, irrespective of wealth. Likewise, as Justice Ginsberg noted, a number of states have legislatively limited punitive damages. *BMW*, 517 U.S. at 614 (Appendix).

Secondly, Ford's precepts about "justice to the poor" and the "deterrent effect of compensatory damages" ignore the very reasons punitive damages exist. Compensatory damages are awarded to afford "justice to the poor", i.e., to make the victim whole. While monetary damages can never accomplish this feat when individuals, like the Ammermans, suffer lifetime disabilities, those damages should never be confused with the rationale for punitive damages: punishment and deterrence. If compensatory damages were sufficient to deter reprehensible behavior, Ford would have recalled the Bronco II. Unfortunately, Ford continues to weigh the cost of a recall with the cost of compensation, and has determined that litigation is the best economic course for the company. *See, Ford Motor Co. v. Stubblefield*, 319 S.E.2d 470

(Ga.Ct.App. 1984) (awarding $8 million in punitive damages to deter Ford from delaying implementation of safety device to protect its profits); R. 7268, 7286 (Ford rejects track increase to avoid jeopardizing release).

Ford is not being punished for having wealth outside the State of Indiana: it is being punished for its culpable behavior within the state. Having engaged in that conduct, Ford is not afforded immunity because it chooses to operate nationwide. Rather, Ford must be treated the same as all corporations, including those engaged solely in intra-state operations. If Ford's theory of extraterritoriality is adopted, multi-state companies can dilute any one state's ability to assess a deterrent award to protect its own interests. *BMW* never intended to shield non-resident corporations from their own wrongdoing simply because of their non-resident status. Instead, evidence relevant to determining the degree of reprehensibility is relevant, even if it occurs out of state. *BMW*, 517 U.S. at 574, n.21.

C. The Indiana Court Of Appeals Correctly Applied The Third *BMW* Factor, Giving Ford Fair Notice Of The Penalty

The third factor which determines whether a defendant had fair notice of the severity of the penalty imposed is the difference between the punitive damages award and the civil penalties authorized or imposed in comparable cases. *BMW*, 517 U.S. at 574-75. Ford was afforded more than "adequate notice of the magnitude of the sanction", *Id.* at 574, that an Indiana court might impose on a product manufacturer for willfully placing a "potentially lethal product into the stream of commerce with a heedless disregard for public safety." App. 61a.

In *BMW*, the defendant's conduct was comparable to a violation of Alabama's Deceptive Trade Practices Act, which carried a maximum civil penalty of $2,000. Moreover, there were no judicial decisions in Alabama or elsewhere indicating that *BMW's* policy might give rise to

a $2 million punitive award. *Id.* at 584. By contrast, Ford had ample notice its actions could subject it to severe sanctions. Although there is no comparable civil or criminal statutory penalty in Indiana for the manufacture and sale of a defective product (*see* App. 42a), and the violation of common law duties does not lend itself to a comparison with statutory penalties under this factor of *BMW, Continental Trend Resources, Inc.*, 101 F.3d at 641, both the criminal and civil statutes provide some guidance regarding Indiana's "legislative judgments concerning appropriate sanctions for conduct at issue." *BMW*, 517 U.S. at 583 (citations omitted).

The trial court noted that the punitive damages award "approximates the treble damages allowed under our civil code for offenses against property." App. 63a. Although a comparison to criminal statutory penalties is largely irrelevant when, as here, the conduct at issue is not contemplated by legislative action, *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 165 (Wis. 1997), Ford nevertheless contended to the Court of Appeals that its conduct was analogous to criminal recklessness, pursuant to Ind. Code 35-42-2-2(c), and urged a comparison of the penalty for that offense with the punitive damages awarded. App. 42a n.23. Criminal recklessness, a felony, carries a maximum monetary penalty of $10,000, and includes imprisonment for up to three years. Ind. Code 35-50-2-7. Even if this statutory penalty applied, it provided Ford with ample notice of a significant monetary sanction. Because each instance where a Bronco II was placed into the Indiana stream of commerce constitutes a separate violation of the statute, Ford risked being penalized $10,000 for each of the 11,452 Bronco II's it sold in the state, for a total of $114 million in monetary penalties. R. 125.

In addition, Indiana statutes provide an alternative penalty for a criminal offender, namely, "a sum equal to twice his pecuniary gain, or twice the pecuniary loss sustained by the victims of the offense he committed." Ind. Code 35-50-5-2. At twice its pecuniary gain from the

sale of Bronco II's in Indiana, Ford was on notice it could incur a monetary penalty of $81,767,280 (the amount of profit Ford realized per vehicle ($3,570) times the 11,452 Bronco II's sold in Indiana times two). R. 125, 7195. At twice the victims' pecuniary loss, Ford was on notice it could incur a monetary penalty of $8,800,000 (the compensatory award of $4,400,000 times two).

Prior Indiana punitive damage awards also gave Ford ample notice that its actions could subject it to severe sanctions. At the time this tort occurred,[6] Indiana had already sustained punitive damages in ratios of 68:1 and 150:1. *See Archem, Inc. v. Simo*, 549 N.E.2d 1054 (Ind.Ct.App. 1990), *trans. denied, cert. dismissed* ($750,000 punitive and $11,000 compensatory award); *Emerson v. Markle*, 539 N.E.2d 35 (Ind.Ct.App. 1989), *trans. denied* ($150,000 punitive and $1,000 compensatory award). Indiana appellate courts affirmed a $5 million punitive damages award and $1,690,895 actual damages award in a products liability case where no personal injuries were sustained. *Dow Chemical Co. v. St. Vincent Hosp. & Health Care Ctr.*, 553 N.E.2d 144 (Ind.Ct.App. 1990). These decisions gave Ford notice it could be held liable for the magnitude of punitive damages awarded.

Ford contends that review is warranted because of a perceived conflict among lower courts in applying *BMW's* "comparable penalty" guidepost. However, Ford presents no direct and mature conflict in other jurisdictions requiring resolution by this Court. A careful reading of Ford's

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[6] Ford misleadingly contends the largest award affirmed in Indiana was $150,000 in a case decided in 1984, apparently under the erroneous assumption that its wrongful conduct occurred before its manufacture of the Watkins vehicle. *See* Pet. 24. However, Ford committed the continuing wrong of placing dangerously defective vehicles on Indiana roads. App. 30a, 60a-61a. Thus, the state court decisions which gave prior notice are those rendered prior to the accident, because until then Ford had the option of recalling its defective product from the marketplace.

cases reveals no disregard for the comparable penalty factor, but merely a recognition that statutory penalties, particularly those authorizing imprisonment as well as fines, were not designed to deter corporations from committing civil wrongdoing. *See Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d at 165 (trespass, property damage); *Green Tree Acceptance of Texas, Inc. v. McGrath*, 1998 WL 337755, at *5 (Tex.Ct.App. 1998) (trespass, property damage, deceit); *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1337-39 (11th Cir. 1999) (water pollution); *BMW of North America, Inc. v. Gore*, 710 So.2d 507, 514 (Ala. 1997) (profit from wrongful conduct exceeds penalty); *Jimenez v. Chrysler Corp.*, 74 F.Supp.2d 548, 584 (D.S.C. 1999) (penalties not applicable to products liability case); *Wal-Mart Stores, Inc. v. Robbins*, 719 So.2d 245, 246 (Ala.Ct.App. 1998) (degree of reprehensibility and personal injuries sustained given greater weight than low statutory penalty). "[M]any serious criminal offenses [are] chiefly aimed at individuals, rather than corporate entities, where the principal sanction is imprisonment, and the monetary penalty is relatively small. In this situation, the criminal fine for similar misconduct is not very pertinent in reviewing an award of punitive damages." *Bowden v. Caldor, Inc.*, 710 A.2d 267, 286 (Md.Ct.App. 1998).

Similarly, the cases Ford cites which decline to apply general statutory penalties to specific wrongful conduct recognize the dissimilarity of that conduct to the behavior proscribed. *See* App. 42a (manufacture and sale of a defective product); *Continental Trend Resources, Inc.*, 101 F.3d at 641 (tortious interference with contracts); *Inter Medical Supplies, Ltd. v. EBI Medical Systems, Inc.*, 181 F.3d 446, 468 (3rd Cir. 1999), *cert. denied* (decision based on reprehensibility factor; no statutory comparison); *Broome v. Biondi*, 17 F.Supp.2d 211, 229 (S.D.N.Y. 1997) (analogous statute provided no statutory punitive damage limits; sustained award based on reprehensibility factor and low 2:1 ratio).

None of Ford's cases where the courts evaluated general statutory sanctions reduced the punitive damages

award based solely on the third factor. *See Schmizzi v. Illinois Farmers Ins. Co.*, 928 F.Supp. 760, 786 (N.D. Ind. 1996) (high ratio; no physical harm); *Lee v. Edwards*, 101 F.3d 805, 812-13 (2nd Cir. 1996) (award higher than those in more egregious cases); *Ace v. Aetna Life Ins. Co.*, 139 F.3d 1241, 1248-49 (9th Cir. 1998), *cert. denied* (high ratio); *Bowden*, 710 A.2d at 280 (same); *Florez v. Delbovo*, 939 F.Supp. 1341, 1349 (N.D.Ill. 1996) (same).

Although the Ammermans agree with Ford that a comparison to prior punitive damages awards is relevant to the excessiveness inquiry (Pet. 23-24), they disagree with Ford's contention that the Court of Appeals "ignored" prior caselaw in affirming this award. The Court of Appeals specifically referred to two cases prior to the accident where Indiana courts had affirmed punitive damages awards which were 150 and 68 times the actual damages. App. 44a, citing *Emerson*, 539 N.E.2d 35 and *Archem*, 549 N.E.2d 1054. Those large multiples, as well as awards of $1 million or more, gave Ford notice that Indiana courts would not hesitate to impose a large punitive award where the defendant's conduct was particularly egregious. *See Dow Chemical Co.*, 553 N.E.2d 144 ($5 million punitive award); *Lazarus Dep't Store v. Sutherlin*, 544 N.E.2d 513 (Ind.Ct.App. 1989), *trans. denied* ($1 million punitive award).

Moreover, Ford knew it risked a large sanction by placing dangerously defective products in the marketplace. *See*, e.g., *Stubblefield*, 319 So.2d 470 (Mustang; $8 million punitives); *Hasson v. Ford Motor Co.*, 650 P.2d 1171 (Cal. 1982), *cert. dismissed* (Lincoln; $4 million punitives); *Ford Motor Co. v. Nowak*, 638 S.W.2d 582 (Tex.Ct.App. 1982), *writ refused* (Ford; $4 million punitives); *Grimshaw*, 174 Cal.Rptr. 348 (Pinto; $3.5 million punitives). Ford cannot seriously contend that its "reckless disregard for anything but market share and the bottom line" (App. 61a) would result in a less severe sanction in Indiana than it had incurred in California, Georgia, and Texas in the decade preceding the Ammermans' accident.

The fundamental question under *BMW's* third factor is whether the wrongdoer had notice of the severity of the sanction. *BMW*, 517 U.S. at 574-75. In this case, the answer is a resounding "yes".

Moreover, to the extent a closely analogous penalty statute exists and was drafted to punish the conduct at issue, the cases Ford cited show that the lower courts are giving due consideration to the penalties authorized by statute. Accordingly, there is no conflict between jurisdictions requiring resolution by this Court.

CONCLUSION

For the foregoing reasons, Vicki Ammerman, Guardian of Pamela Ammerman, and Lana Ammerman, respectfully requests that certiorari be denied.

February 18, 2000

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No. 99-1221

IN THE
Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

VICKI AMMERMAN, Guardian of
PAMELA AMMERMAN, and LANA AMMERMAN,

Respondents.

On Petition For A Writ Of Certiorari
To The Court Of Appeals Of Indiana

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Respondents' 30-page opposition barely discusses—and seriously misperceives—the actual questions presented, seeks to distract the Court with overblown rhetoric and irrelevant allegations, misstates the record, and misunderstands this Court's decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). The bulk of respondents' brief is nothing other than an oft-repeated amalgamation of overheated jury arguments based on a one-sided recitation of the purported "facts." *See* Opp. 3-7, 15-17. While this approach successfully fomented the jury in this case into excess, it is entirely irrelevant to the two questions presented. Respondents have manifestly failed to rebut Ford's demonstration that lower federal and state courts have reached directly conflicted and confused results with respect to those important and recurring questions. This Court's review is necessary to resolve the conflicts.

A. The "Wealth" Question Warrants This Court's Review And Is Squarely Presented By This Case

1. Respondents do not, because they cannot, seriously dispute that the lower courts are in conflict over Question 1 regarding what role a defendant's wealth should play in scrutinizing punitive damages for excessiveness under *BMW*. *See* Pet. 11-16. Rather, respondents themselves concede that "the lower courts may differ in the emphasis they place on the defendant's financial status," and the most that they can muster in response is the assertion that a "majority" of courts decide the issue in the way that respondents deem correct. But, without so much as a single citation, respondents write off these clear conflicts as merely a quirk of federalism produced by "historical differences embodied in each state's common law." Opp. 24. As Ford has demonstrated, however, many courts, like the courts below here, are not confining their analysis of wealth to the state-law excessiveness inquiry, but rather are invoking the defendant's wealth as part and parcel of the *federal constitutional* analysis as a means to trump the three *BMW* guideposts and to uphold

punishments that otherwise would be deemed excessive under the Due Process Clause. Pet. 11-15.[1] Such decisions flatly contradict numerous decisions from other courts that have squarely rejected wealth as part of the *BMW* inquiry. *Id.* at 16.

Nor can respondents escape the *BMW* Court's rejection of the plaintiff's argument in that case that the defendant's significant wealth saved the $2 million punishment from a finding of excessiveness under the Due Process Clause. *See* Pet. 9-11. Although respondents argue that state courts have long considered the defendant's wealth in analyzing punitive damage awards under *state* law and that this Court has not held that state courts are constitutionally barred from doing so (Opp. 20-21), that begs the question whether the defendant's wealth is or should be part of the *federal* constitutional calculus. The *BMW* Court, by refusing to include wealth as a guidepost, and by declaring, "[t]he fact that [a defendant] is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business," 517 U.S. at 585, rejected wealth as a due process factor. But many lower courts—like respondents—have read wealth back into the due process equation, creating intolerable conflict and uncertainty and defeating any possibil-

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[1] Respondents repeatedly and inexplicably state that Ford is not challenging the $13.8 million punitive damage award as excessive under *BMW*. *E.g.*, Opp. 21. But Ford is, of course, challenging the punitive damage award here as grossly excessive under the three *BMW* guideposts, as it made crystal clear in its petition. *E.g.*, Pet. 2 (the court below allowed Ford's wealth "to determine the outcome" of its *BMW* analysis and "defeated the *BMW* due process 'guideposts' for determining constitutional excessiveness by according an overpowering effect to Ford's financial status"). The Indiana Court of Appeals' inappropriate reliance on Ford's financial status caused it to affirm an award that is constitutionally excessive under all three *BMW* guideposts and cannot be justified by any legitimate state interest in punishment or deterrence.

ity that defendants will "receive fair notice . . . of the severity of the penalty that a State may impose." *Id.* at 574.

2. Respondents' main argument against certiorari is that "Ford's wealth is not, and never has been, a component of the calculus for punitive damages" in this case. Opp. 9; *id.* at 1 ("wealth forms no part of the remitted punitive award"). But that assertion is simply false.

a. From start to finish, respondents argued below that Ford's wealth justified a massive punishment. In their transfer petition to the Indiana Supreme Court, respondents explicitly argued that "[t]he amount of money necessary to punish and deter a multinational corporate conglomerate *must* take into account its wealth." S.L. 1 at 2. (Ammermans Brief Supporting Transfer) (emphasis added).[2] Respondents further argued:

> It was uncontroverted that Ford earned 50 million dollars for every hour of sales; 40 million dollars in weekly sales in Indiana alone, had yearly profits of five billion, eight hundred million dollars, and its assets totaled over two hundred billion dollars. *On this evidence, the jury determined that 58 million dollars was an appropriate punishment for this defendant.* The penalty constituted slightly more than one hour of sales and less than six one hundredths of a percent (.006%) of Ford's total assets. Under established Indian law, this verdict was not excessive. *See Dow Chemical v. St. Vincent Hospital and Health Care Center, Inc.*, 553 N.E.2d 144 (Ind. Ct. App. 1990) (punitive award of .035% of Dow's total assets not excessive).

Id. (emphasis added). Respondents had made the virtually identical arguments to the court of appeals. *See* S.L. 2 at 60 (Ammermans Reply Brief); S.L. 3 at 14 (Ammermans Brief Opposing Rehearing) (Ford had "ample notice" of "severe sanctions" because a prior Indiana case had upheld punitive award equal to 1% of company's net worth; given Ford's

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[2] Twelve copies of all documents with "S.L." cites have been lodged with the Office of the Clerk of the Court.

income, Ford "could have been assessed $219 million" in punitives under that "1% toll").

Respondents' counsel had invited reliance on Ford's worldwide wealth through his repeated inflammatory and prejudicial arguments to the jury based on Ford's economic status. In proposing punitive damages figures to the jury, respondents' counsel explained that "I want you to understand that when I mention these numbers to you that there are several things that are important. *The first is the wealth of the defendant.*" R. 11453. He never got to the second. *See Id.* at 11453-57. Rather, he stressed that Ford's total sales for 1994 was $107,000,000, which he characterized as being "Two Billion Dollars ($2,000,000,000) a week. In a 40-hour week, their sales were Fifty Million Dollars ($50,000,000) an hour." *Id.* at 11454-55. He then suggested that the jury take away at least one hour of Ford's profits, arguing that "[i]f it was a food service worker, would you hesitate to award Five Dollars and Fifty Cents ($5.50) for one hour?" *Id.* at 11455. As respondents later argued to the Indiana Supreme Court, such arguments clearly had their intended effect.[3]

b. It is equally clear that the courts below based their evaluation of the punitive damage award on Ford's overall wealth. Based on respondents' own arguments, the trial court, for example, rejected Ford's *BMW*-based arguments and held—largely because of Ford's wealth—that even the original $58 million punitive damage verdict was not constitutionally excessive: "Ford's net worth is about $219 Billion [sic] and its gross income in 1994 was, roughly, $50 Million per hour. The punitive damages awarded represented only 1% of Ford's 1994 profits. This Court cannot say that within

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[3] Respondents' assertion that Ford failed to object to the *admission of evidence* regarding Ford's wealth misses the point. Ford is not arguing here that the admission of such evidence violated due process, but that the courts below misinterpreted *BMW* by *using* the evidence of Ford's wealth to uphold an otherwise unconstitutional punishment.

the context of Ford's enormous wealth, its profit of $2.2 Billion from the sale of Bronco II, and the damages sustained that 'at first blush' or otherwise, these damages are excessive." Pet. App. 62a.

To be sure, the trial court remitted the award to $13.8 million because it concluded that, at respondents' counsel's invitation, the jury had violated the rule against extraterritorial punishment by calculating the award by multiplying $83.00—the amount respondents alleged Ford had saved on each vehicle by not complying with their proposed stability index standard—by the total number of Bronco IIs Ford actually sold throughout the entire world (approximately 700,000). Pet. App. 34a, 37a. Thus, if the jury's verdict were properly limited to the Bronco IIs sold within the State of Indiana, the jury's calculus would result in a maximum punitive award of *$950,516* ($83 multiplied by 11,452).

The trial court, however, based the $13.8 million remitted award on what it believed it would have cost Ford to retool the production lines for *every Bronco II sold anywhere in the world* to comply with respondents' proposed standard—an amount just as unconstitutionally based on Ford's lawful conduct in other States as the jury's original verdict. The court's reliance on Ford's worldwide wealth as a factor in upholding the punishment likewise amounted to a punitive tax based on Ford's lawful activities outside the State of Indiana. *Cf. Hunt-Wesson, Inc. v. Franchise Tax Bd.*, U.S. No. 98-2043 (Feb. 22, 2000).

The court of appeals rejected Ford's excessiveness and extraterritoriality challenges to the remitted award, and upheld the award of $13.8 million in punitive damages, expressly relying on Ford's worldwide wealth. Again, mirroring respondents' arguments, the court of appeals explained that Ford had constitutionally adequate notice that it could be subjected to such a severe punishment in Indiana because "[w]hen reviewing an award of punitive damages we consider two primary factors. First, the nature of the tort and the extent of the actual damages sustained should be considered. *Second, the economic wealth of the defendant should be considered.*" Pet. App. 42a-43a (emphasis added). In other

words, the court established a principle that will swallow the *BMW* fair notice principle whole: Wealthy companies are always on notice that they can be subjected to severe punishments in jurisdictions that allow courts to invoke the company's wealth as a basis for upholding the punishment. This approach, although clearly inconsistent with *BMW*, has been adopted by numerous other courts. *See, e.g.*, *Anderson v. General Motors Corp.*, No. BC116926, slip op. at 2-3 (Cal. Super. Ct., Los Angeles County) (Aug. 26, 1999) (upholding $1.09 *billion* in punitive damages under *BMW*, reasoning that "defendant possessed information of its financial condition, putting it on notice that it might face an award as large as the one in this action").[4]

Having held that Indiana law mandated that it "should" rely on Ford's overall wealth, the court of appeals did just that in deciding that Ford had received constitutionally required notice for purposes of *BMW*. Pet. App 44a (explaining that it was "especially true" that Ford had notice of the potential size of the punishment "given that Ford's economic wealth . . . is a factor to be considered in assessing punitive damages"); *see also id.* (citing *Dow Chemical*, 553 N.E.2d at 144, 151 (upholding punitive award based on company's "phenomenal wealth")).[5]

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[4] Respondents rely on earlier Indiana decisions with higher punitive to compensatory ratios than the 18:1 and 2:1 ratios here—but vastly lower punitive damages awards—to argue Ford had adequate notice. But the *BMW* Court did not hesitate to hold that the punitive award in that case violated due process, despite the fact that earlier Alabama decisions had upheld awards that equaled or exceeded the 500:1 ratio present in *BMW*. *E.g.*, *Health-America v. Menton*, 551 So.2d 235 (Ala. 1989) (746:1); *USA Principal Fin. Group v. Thomas*, 585 So.2d 816 (Ala. 1991) (750:1).

[5] Equally wrong is respondents' argument that Ford failed to preserve this question below. Respondents do not dispute that Ford raised *BMW* excessiveness challenges to the $13.8 million punitive damage award in both the Indiana Court of Appeals and Indiana Supreme Court; having raised its federal due process claim in

[Footnote continued on next page]

3. Respondents' attempt to wish away the troubling questions presented by the decision below by insisting that it was the alleged reprehensibility of Ford's conduct that drove the punitive damage award—and nothing else. *E.g.*, Opp. 9-12. As discussed above, however, both courts below explicitly allowed Ford's wealth to tip the scales of their constitutional analysis under *BMW*; in any event, respondents overargue the reprehensibility point, steadfastly refusing to let the record get in the way.

For instance, while it is true that the jury was instructed that it could not award punitive damages unless it found that Ford exhibited "reckless disregard for[] the health and safety of its consumers" (Opp. 16), the jury's conclusion on this score is manifestly inconsistent with the specific findings of the National Highway Traffic Safety Administration ("NHTSA") that the Bronco II's stability characteristics do not distinguish it from other sport-utility vehicles on the market, and that there is no basis to conclude that the *entire class* of sport-utility vehicles on the road is defective with respect to motor vehicle safety. R. 10193. The trial court's condemnation of Ford for failing to increase the Bronco II's so-called "stability index" is also at odds with the views of the federal government, which—throughout the period in which Ford manufactured and sold Bronco IIs—rejected any design rule based on the "stability index," in part on the grounds that adherence to such a design rule "could have a net adverse effect on safety." 52 Fed. Reg. 49033, 49034 (1987). Respondents' assertion that Ford withheld crucial

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[Footnote continued from previous page]
the courts below, Ford is entitled to raise any and all arguments in support of that claim in this Court. *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."). In any event, Ford's opening brief to the Indiana Court of Appeals contained an entire section dedicated to this very issue. S.L. 4 at 76-77 (Ford Appellant Brief).

records from NHTSA that would have changed the agency's opinion is specious. As respondents are aware, the federal government has conclusively rejected this accusation—and has reaffirmed its conclusions about the Bronco II with the benefit of all of the documents plaintiffs find significant. *See* 64 Fed. Reg. 27343, 27353 (1999) ("consistent with its findings [in 1990], [NHTSA's] analysis of more recent data indicates that the rollover propensity of the Bronco II does not stand out from that of other peer [sport-utility vehicles].").

Respondents and their experts would have had Ford's engineers draw the design lines differently—making the vehicle wider and shorter—in disregard of NHTSA's admonition that blind adherence to a vehicle's stability index could "have a net adverse effect on safety." 52 Fed. Reg. at 49034. But the mere fact that Ford's engineers can retrospectively be second-guessed by respondents' experts does not establish a high degree of reprehensibility under *BMW*. Just as BMW was required to draw careful lines in distinguishing "between presumptively minor [pre-sale] damage [to new vehicles] and damage requiring disclosure to purchasers" (517 U.S. at 579), Ford's engineers were required to mediate the Bronco II's function as an off-road sport-utility model with the need for optimum on-road stability—all with the goal of ensuring that the vehicle that was finally released to consumers was not "*unreasonably* dangerous." R. 11886 (emphasis added).

Of course, determining the "reasonableness" of the design under these circumstances required careful line-drawing and the exercise of professional and scientific judgment. Nearly all juries around the country that have reviewed the matter have agreed that Ford's Bronco II engineers acted responsibly, and have either specifically found the Bronco II to be defect-free or have otherwise returned a verdict for Ford.[6]

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[6] *See* S.L. 4 at 66 n.19 (Ford Appellant Brief) (six juries outside Indiana had either explicitly found the Bronco II non-defective or returned a verdict for Ford., whereas only two juries had returned a verdict for plaintiffs in Bronco II rollover actions, and one of those had expressly found the Bronco II to be defect-free).

Nevertheless, even assuming that a jury could properly impose compensatory liability based on Ford's failure to adopt respondents' stability index design standard, the line-drawing conducted by Ford's engineers plainly does not "establish the high degree of culpability that warrants a substantial punitive damages award." *BMW*, 517 U.S. at 580. Respondents' argument to the contrary deprives the reprehensibility prong of the *BMW* analysis of all meaning.

B. This Court's Review Is Also Necessary To Clarify The Comparable Penalty Element Of *BMW*

Respondents' opposition to certiorari on Question 2 regarding *BMW's* comparable penalty guidepost engages in the same sort of analysis that numerous lowers courts now employ to evade that factor and uphold huge punishments. As Ford demonstrated (Pet. 21-24), lower courts have reached directly conflicting decisions over application of this guidepost, with some, like the Indiana Court of Appeals, holding that it is "not applicable" because there is no civil or criminal statutory penalty governing the specific conduct at issue, even though there are generally applicable fines that encompass that conduct (Pet. App. 42a); while other courts have taken the opposite approach, relying in part on excessiveness in relation to general criminal fines to strike down punitive damage verdicts. Respondents basically concede this conflict, and are left to argue a nonsequitur: "None of Ford's cases where the courts evaluated general statutory sanctions reduced the punitive damages award based solely on the [comparable penalty] factor." Opp. 28-29.[7]

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[7] Respondents' remarkable suggestion that awards imposed after the conduct at issue in this case could somehow provide Ford with constitutionally required notice plainly contradicts *BMW*. *See* 517 U.S. at 574 & n.22 (discussing constitutional ban on retroactively applying increased penalty provisions). Likewise, respondents' novel argument that Ford's "failure to recall" the Bronco II constituted a continuing wrong fails because, among other things, it ignores the settled rule that there is no common law duty to recall, *see Restatement (Third) of Torts: Products Liability* § 11 (1998).

Faced with the fact that the single punishment here vastly exceeds Indiana's general statutory fine for criminal recklessness, undisputedly exceeds the combined *total* of all prior punitive damage awards affirmed in Indiana history, and is nearly 100 times the largest award affirmed in Indiana at the time of the conduct at issue, respondents are forced to resort to clever gimmickry, such as artificially inflating the comparable statutory penalty, citing punitive damage awards from *other* jurisdictions, and citing two cases from Indiana that post-date the conduct at issue but predate *BMW*. This approach, which tracks that of the courts below and other courts around the country, if allowed to flourish, will turn the comparable penalty factor into a "guidepost" to nowhere.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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